No. 83-1870

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1983

CONSUMERS UNION OF UNITED STATES, INC.,

Petitioner,

against

GENERAL SIGNAL CORP. and
GREY ADVERTISING, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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90 pp

QUESTIONS PRESENTED

1. Does the commercial speech doctrine mandate application of the fair use exemption to excuse the verbatim copying of copyrighted material in purely commercial advertisements?

2. Did the Court of Appeals violate this Court's holdings in Sony Corp. of America v. Universal City Studios, Inc., 104 S.Ct. 774 (1984), concerning the application of the fair use exemption by (i) failing to consider commercial use as presumptively unfair; (ii) requiring the copyright holder to show "actual" rather than "potential"

harm to the value of the copyright; (iii) failing to recognize that harm is presumed when the infringing use is, as here, intended purely for commercial gain; (iv) failing to consider the deleterious effect of the commercial use upon petitioner's derivative markets; and (v) failing to consider the adverse effect upon petitioner if the Court-authorized infringement should become widespread?

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No. 83-

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1983

CONSUMERS UNION OF UNITED STATES, INC.

Petitioner,

-against-

GENERAL SIGNAL CORP. and
GREY ADVERTISING, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Consumers Union of United States, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered

in this proceeding on November 25, 1983, and confirmed in that Court's opinion dated December 6, 1983, reversing the grant of a preliminary injunction by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The judgment of the Court of Appeals for the Second Circuit dated November 25, 1983 is unreported and is annexed to this petition as Appendix A (1a-2a). The Court of Appeals' opinion of December 6, 1983 is reported at 724 F.2d 1044 (2d Cir. 1983) and is annexed as Appendix B (3a-24a). The Court of Appeals' unreported orders dated February 14, 1984, granting in part and denying in part rehearing, and denying, over a dissenting opinion, rehearing en banc,

are annexed as Appendices C (25a-27a) and D (29a-33a) respectively. The Southern District of New York's order issuing a preliminary injunction of October 13, 1983 and its memorandum decision of October 12, 1983 are both unreported. They are annexed as Appendices E (35a-38a) and F (39a-62a) respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on November 25, 1983 and confirmed in that Court's opinion of December 6, 1983. A timely petition for rehearing and rehearing en banc was granted in part and denied in part on February 14, 1984. This petition for a writ of certiorari is being filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution Art. 1, Sec. 8, Cl. 8:

> The Congress shall have Power...
>
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

U. S. Constitution Amend. I:

> Congress shall make no law ... abridging the freedom of speech, or of the press ....

Copyright Revision Act of 1976, § 106, 17 U.S.C. § 106:

> Subject to sections 107 through 118, the owner of copyright

under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture of other audiovisual work, to display the copyrighted work publicly.

Copyright Revision Act of 1976, § 107, 17 U.S.C. § 107:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

STATEMENT OF THE CASE

In the words of the Court of Appeals this case "presents important issues with respect to the interplay of the First Amendment commercial speech doctrine and the fair use defense to a claim of copyright infringement." (4a)

Petitioner is Consumers Union of United States, Inc. ("Consumers Union"), the publisher of CONSUMER REPORTS magazine, and the nation's leading independent consumer research and testing organization. Petitioner's primary purpose, through the sale of its publications and the controlled disposition of its materials for use in secondary markets, is to inform, educate and advise the consuming public accurately and impartially about a wide

variety of products and services. (5a)

Consumers Union itself creates the information and advice it offers the public. Consumers Union's publications consist almost exclusively of the findings and judgments of Consumers Union's testers, researchers and writers based on petitioner's own laboratory and controlled use tests of product samples or services purchased at retail.*

* The efforts which Consumers Union expends in its editorial and testing procedures are described in Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d 932, 940 (2d Cir. 1980), cert. denied, 449 U.S. 839 (1981), and Bose Corp. v. Consumers Union of United States, Inc., 508 F. Supp. 1249, 1255-57, 1258-59 (D. Mass. 1981), rev'd on other grounds, 692 F.2d 189 (1st Cir. 1982), aff'd, 52 U.S.L.W. 4513 (U.S. Apr. 30, 1984).

Consumers Union publishes its original findings and analyses in its own magazines and books, in its syndicated newspaper columns and radio broadcasts, in its cable television program and in other forms and other media. Petitioner's best-known publication is the monthly magazine CONSUMER REPORTS which has a circulation of approximately three million.

Since Consumers Union accepts no outside advertising in any of its publications, virtually all of petitioner's income comes solely from the sale of its original work, that is, through subscription and newsstand sales of CONSUMER REPORTS, through sales of books and other periodicals and by

extensive derivative use of its material in other publications and media.

Like many publishers, petitioner extensively adapts and republishes its original work, a right it has under the copyright statute, 17 U.S.C. § 106(2).

Essential to Consumers Union's ability to sell CONSUMER REPORTS and its derivative products in the highly competitive marketplace for consumer information is Consumers Union's "impressive" (24a) reputation for impartiality in providing accurate and objective judgments on the products of competing manufacturers. This reputation, as the District Court noted (41a-42a), rests on petitioner's insistence since its founding in 1936

that no advertising use can be made of its reports. (5a)* Thus, in order to enhance its ability to continue its work and survive in its competitive market,

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* Consumers Union goes to great lengths to make known to product manufacturers and to the public generally its refusal to permit its ratings, findings and name to be used in advertising. Each issue of CONSUMER REPORTS since the first one in 1936 has stated in substance (5a):

> Consumers Union accepts no advertising or product samples and is not beholden in any way to any commercial interest. Its Ratings and product reports are solely for the use of readers of CONSUMER REPORTS. Neither the Ratings nor the reports may be used in advertising or for any commercial purpose. Consumers Union will take all steps open to it to prevent such uses of its material, its name, or the name of CONSUMER REPORTS.

Consumers Union has steadfastly foregone the secondary source of revenue which it might otherwise earn by allowing advertisers to quote its original words and expressions or refer to its ratings.

Respondent General Signal Corp. is the parent of the Regina Company which manufactures, among other products, lightweight electric vacuum cleaners under the tradename "Electrikbroom."*

The July 1983 issue of CONSUMER REPORTS reported on Consumers Union's

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* The other respondent is the Regina Company's advertising agency, Grey Advertising Inc., whose Chicago subsidiary, Grey North, Inc., prepared the commercials in question. Both respondents are referred to collectively as "Regina."

evaluation of eighteen models of lightweight vacuum cleaners including several manufactured by Regina. (The article is reproduced in full as Appendix G. (63a-75a)) Although the article noted several shortcomings of the "Regina Electrikbroom Power Team," that brand model was "checkrated" by CONSUMER REPORTS.*

Three months after the publication of the July 1983 issue of CONSUMER REPORTS, and after having ascertained from petitioner that it objected to advertising use (45a-46a), respondents launched a national

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* That is, Consumers Union's engineers determined that the sample tested was of high overall quality and appreciably superior to the other models tested at the same time.

television advertising campaign on all three networks prominently featuring verbatim quotations from CONSUMER REPORTS*. One of respondents' commercials, which respondents themselves titled "CONSUMER REPORTS," consists virtually in its entirety of verbatim quotations taken from the July 1983 CONSUMER REPORTS article (the copied quotations are underlined) (77a-79a):

> And CONSUMER REPORTS states, "Regina Powerteam -- far ahead of the pack in cleaning ability."
>
> Of all the lightweights tested "only one worked well."

* The full text of the two commercials challenged by petitioner, as revised by respondents during the proceedings in the District Court, is set forth in Appendix H. (77a-79a)

> On medium pile carpeting Powerteam "did the job with the least effort."
>
> In fact, it's the only one CONSUMER REPORTS calls an "adequate substitute for a full-sized vacuum."

The text of each quotation is not only read aloud by the announcer, but also simultaneously appears on the screen in print. Each quotation is further framed on the screen by the following words (77a-79a):

> CONSUMER REPORTS
>
> [text of quotation]
>
> CONSUMER REPORTS is not affiliated with Regina and does not endorse Regina products or any other products.

Immediately upon learning of respondents' commercials, Consumers Union sought and received, on notice, a

temporary restraining order in the District Court on October 3, 1983 enjoining broadcast of the two offending commercials. Ten days later, the District Court entered a preliminary injunction.* (35a-38a)

Respondents appealed on an expedited basis. On November 25, 1983,

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* In the District Court and the Court of Appeals, petitioner charged respondents with copyright infringement, violation of Section 43(a) of the Lanham (Trademark) Act, 15 U.S.C. § 1125(a), and various state law offenses. Jurisdiction below was based on 28 U.S.C. §§ 1331, 1332, 1338 and pendent jurisdiction. The District Court ruled only on petitioner's copyright claim in granting the injunction. (62a) On appeal, the Court of Appeals reversed the District Court's copyright holding and also rejected Consumers Union's Lanham Act and state law claims. (17a-23a) Only the copyright claim is raised in this petition.

the Court of Appeals reversed the District Court and vacated the injunction. (1a-2a) The court issued its opinion in support of its judgment on December 6, 1983.* (3a-24a)

Following the appeals court's judgment, respondents broadcast the commercials on nationwide television. Upon information and belief, they are still being broadcast.

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* Petitioner timely moved for rehearing. The Court of Appeals' decision on rehearing was issued on February 14, 1984, approximately one month after this Court's decision in Sony Corp. of America v. Universal City Studios, Inc., 104 S.Ct. 774 (1984).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Misapplication of the Commercial Free Speech Doctrine Severely Undermines the Constitutional and Statutory System of Copyright Protection to the Public's Detriment.

The Court of Appeals found that the "interplay of the First Amendment commercial speech doctrine" (4a) mandated the application of the fair use defense to excuse respondents' copyright infringement.* Because these vacuum cleaner commercials appropriated expressions from CONSUMER REPORTS which

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* The questions of copyrightability, access, copying, lack of consent and fulfillment of procedural prerequisites for suit were all undisputed below. There were similarly no disputes concerning the material facts underlying the fair use defense.

were "of significant public interest", the commercials themselves were, the court ruled, "protected by the First Amendment", citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (11a).* Therefore, the Court of

* In Virginia State Board of Pharmacy, the Court held that a state could not completely ban the dissemination of commercial information about prescription drug prices. Neither the facts nor the issues before the Court in that case permit that holding to be properly used as a basis for allowing a product advertisement to override copyright protection. Indeed, the Court limited the scope of its decision in Virginia State Board of Pharmacy, ultimately concluding that commercial advertising was unworthy of full First Amendment protection. The Court noted that because of the "commonsense differences" between commercial speech and other varieties, even commercial speech subject to First Amendment protection enjoys a "different degree of protection" than that normally accorded under the First Amendment. 425 U.S. at 771-72 n. 24.

Appeals found that petitioner's copyright must give way in this purported conflict between commercial free speech and copyright protection.

This holding is inconsistent with this Court's numerous decisions in the commercial speech area. It also conflicts with the views on copyright and fair use which this Court expressed in Sony Corp. of America v. Universal City Studios, Inc., 104 S.Ct. 774 (1984), and with the decisions of other circuit courts, including the Second Circuit itself.

The erroneous ruling below is not limited to petitioner alone. Its force

applies to all useful non-fiction* works containing information at least as weighty in terms of "significant public interest" as petitioner's evaluation of a lightweight vacuum cleaner. The ruling makes the original expression of all such works fair game for inclusion in product advertisements.

To hold that the First Amendment permits product manufacturers selling their wares to use copyrighted material without permission under these circumstances threatens to vitiate copyright for a massive body of original and important works previously held to be

* In just a single year, 1982, more than 25,000 non-fiction works were published in the United States. The Bowker Annual of Library and Book Trade Information, 372-373 (28th ed. 1983).

protected. To nullify the copyright for those works which most directly serve the public's needs -- indeed, to do so because they serve the public interest -- and to allow them to be exploited commercially solely for the private gain of an advertiser is antithetical to the purposes of the copyright statute. This holding will surely discourage the authorship of important information while providing no benefits to freedom of expression. The ruling below disserves the public interest.

The respondents' commercials simply urge viewers to buy a Regina vacuum cleaner and little more. In none of its decisions concerning governmental prohibition or regulation of advertising has this Court ever remotely suggested

that the values inherent in such purely profit-motivated speech deserve constitutional protection of a magnitude sufficient to justify infringement of statutory copyright. Rather, the Court has consistently ruled that commercial speech receives only narrow constitutional protection. As Justice Powell wrote in Ohralik v. Ohio State Bar Association, 436 U.S. 447, 456 (1978) (emphasis supplied):

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantees with respect to the latter kind of speech. Rather than subject the First Amendment to such devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in

> the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

See also, Metromedia, Inc. v. San Diego, 453 U.S 490, 505-07 (1981); Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 562-63 (1980); Friedman v. Rogers, 440 U.S. 1, 10 (1979).

Given the limited application of the First Amendment to product advertising, it is not surprising that in the copyright context this Court has held that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright...." Sony Corp. of America v. Universal City Studios, Inc., supra, 104

S.Ct. at 793 (emphasis supplied). Since virtually every commercial use of copyrighted material involves a speech or press component, the Sony holding is a plain recognition that the commercial speech doctrine cannot be misapplied, as here, to render fair an otherwise presumptively unfair use.

In addition to its clear conflict with Sony, (see pp. 32-48, infra), the decision below is contrary to the congressional intent as expressed in the copyright statute and to existing legal scholarship. Section 107 cites "criticism, comment, news reporting, teaching ..., scholarship, or research ..." as examples of fair use. A television commercial for a vacuum cleaner can hardly be said to fit within

any of these categories. As Professor Nimmer has written, "advertising use is a particular form of commercial use which is least likely to justify a fair use defense." 3 Nimmer on Copyright § 13.05[A] at 13-60 n. 24 (1983).

The decision of the Court of Appeals also departs from and conflicts with prior holdings of the Second Circuit and other circuits. In SEC v. Lowe, 10 Media L. Rep. (BNA) 1225, 1231 (2d Cir. 1984), the Second Circuit acknowledged that advertising is entitled to lesser constitutional protection. And the panel's holding is directly contrary to the opinion written by Judge Kaufman in Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc., 621 F.2d 57 (2d Cir. 1980),

rejecting a fair use defense in a case involving the televised biography of an Olympic champion. There, the Second Circuit held that "[t]he fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance". 621 F.2d at 61.

To the same effect, see Roy Export Co. Estab. of Vaduz v. Columbia Broadcasting System, Inc., 672 F.2d 1095, 1100 (2d Cir.), cert. denied, 103 S.Ct. 60 (1982) ("CBS's effort to secure a First Amendment news-reporting exception to the copyright laws cannot succeed."); H.C. Wainwright & Co. v. Wall Street Transcript Corp., 418 F. Supp. 620, 624 (S.D.N.Y. 1976), aff'd sub nom.

Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978); Dallas Cowboy Cheerleaders v. Scoreboard Posters, 600 F.2d 1184, 1187 (5th Cir. 1979) ("The First Amendment is not a license to trammel on legally recognized rights in intellectual property."); Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978).

The Court of Appeals' decision is, to petitioner's knowledge, the only time a court has upheld a fair use defense, under the First Amendment or otherwise, to permit verbatim copying in a purely commercial, non-comparative advertisement. Indeed, the Court of Appeals itself, prior to this decision, and many other courts, have uniformly

rejected such a result. See, e.g., Rosemont Enterprises, Inc. v. Random House, Inc., 336 F.2d 303, 309 (2d Cir. 1960), cert. denied, 385 U.S. 1009 (1967); Amana Refrigeration, Inc. v. Consumers Union of United States, Inc., 431 F. Supp. 324, 326 (N.D. Iowa 1977) ("The excerpt, however, is more than mere statement of fact. It contains [Consumers Union's] original analysis and conclusions and is copyrightable and use by others for economic gain may properly be enjoined."); Dawn Associates v. Links, 203 U.S.P.Q. 831, 835 (N.D. Ill. 1978); Conde Nast Publications, Inc. v. Vogue School of Fashion Modeling, Inc., 105 F. Supp. 325, 337 (S.D.N.Y. 1952); Henry Holt and Co. v. Liggett & Myers Tobacco

Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938).

The "significant public interest" which the Court of Appeals found in respondents' advertising use of petitioner's copyrighted work extends only to that segment of the public considering the purchase of a lightweight vacuum cleaner. To link, as the Court of Appeals did (13a), the societal importance of a vacuum cleaner evaluation with that of a former President's memoirs of a time of national crisis, Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d 195 (2d Cir. 1983), petition for cert. filed, 52 U.S.L.W. 3777 (U.S. Apr. 3, 1984) (No. 83-1632), demonstrates the overbreadth of the court's interpretation and its potential

to destroy copyright protection for non-fiction works.

As Judge Oakes stated in his dissent to the Court of Appeals' denial of the petition for rehearing en banc (34a) (emphasis in original):

> [T]he use of "commercial free speech" to justify a fair use defense to copyright infringement stands either the copyright law or the First Amendment on its head. A use for commercial purposes, the opinion suggests, is more entitled to the fair use defense than a use that is not. At the very least the panel opinion reads the presumption against the fairness of commercial use out of the statute. Doing so in the name of the First Amendment, I fear, cheapens that Amendment's coin.

Nothing in the commercial free speech doctrine requires or even permits the evisceration of copyright protection for the purpose of granting product

manufacturers a free license to exploit protected works in their advertisements. It is difficult to imagine a judicial decision which would be a greater disincentive to serious authorship or which would be more stifling to the creation of works in the public interest.

II. The Court of Appeals' Decision Is In Plain Conflict With Sony Corp. v. Universal City Studios.

Besides misapplying the commercial speech doctrine, the Court of Appeals fundamentally misapprehended the fair use doctrine as set forth in Sony Corp. of America v. Universal City Studios, Inc., 104 S.Ct. 774 (1984). If the opinion below is permitted to stand,

fair use will mean something entirely different in the Second Circuit -- the publishing and advertising capital of this nation -- than it does in the rest of the country.

Sony draws a sharp distinction between copying for "commercial gain" or for a "noncommercial purpose," expressly disfavoring the former. The Sony majority held that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." 104 S.Ct. at 793. As Justice Stevens' opinion further noted, "[c]opying for commercial gain has a much weaker claim to fair use than copying for personal enrichment." Id. at 795, n. 40.

Consistent with this statutory

and judicial presumption, the Sony Court held that even potential harm to the value of the copyright is presumed in commercial use cases. Id.

Despite this Court's clear language, the Court of Appeals held exactly the opposite. It recognized that "Regina's use undoubtedly is commercial." (11a) But rather than disfavoring such use and considering it presumptively unfair, the Court of Appeals encouraged such copying. It held that expropriation of such protected works by advertisers is to be judicially fostered because it "serve[s] the important function of educating the public." (11a)

The Court of Appeals also violated the Sony holding concerning proof of harm. The appeals court held

that Consumers Union had not demonstrated actual harm because it did not establish, by "convincing evidence of a significant deleterious effect" that "Regina's use usurps demand for the July 1983 CONSUMER REPORTS issue." (16a) This extraordinarily high burden of proof conflicts not only with Sony's presumption of harm from commercial use, but also with both the Court's and the dissent's analysis in Sony concerning harm arising from non-commercial or unproductive uses.

As this Court held in Sony, even when opposing a non-commercial use which is not presumptively unfair, the copyright owner need not prove "actual harm" or prove "potential harm" with anything more than a preponderance of the evidence (104 S.Ct. at 793) (emphasis supplied):

> Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists.*

If the infringing use, like that of respondents, is purely commercial, the burden of proof is much less (Id.):

> If the intended use is for commercial gain, that likelihood may be presumed.

* The dissenting opinion agreed (104 S.Ct. at 809):

> Infringement thus would be found if the copyright owner demonstrates a reasonable possibility that harm will result from the proposed use.

Ignoring these rulings, the Court of Appeals set a precedent that will reach far beyond the confines of this case. By requiring the copyright owner to prove actual usurpation of demand (14a-16a) for the particular issue of the magazine copied and to prove such harm by "convincing evidence of a significant deleterious effect" (16a), the Court of Appeals violated Sony's holdings and set standards which are well-nigh impossible for any publisher to meet.*

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* The Court of Appeals' decision effectively reduces the term of petitioner's copyright from the 75 year period granted by 17 U.S.C. § 302(c) to thirty days -- the approximate length of time that an issue of CONSUMER REPORTS is on sale on newsstands. It also cuts back the statute of limitations from three years, 17 U.S.C. § 507(b), to thirty days. Applied to other periodicals, the opinion reduces the copyright period and

(footnote continued on next page)

Moreover, in its improper restrictive inquiry, the Court of Appeals overlooked the potential harm to petitioner's market for derivative uses of its copyrighted works.* The

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(footnote continued from preceding page) statute of limitations of all monthly magazines to thirty days, of all weeklies to seven days, and of all daily newspapers to one day!

* Consumers Union, like many publishers, in fact makes extensive use and re-use of its material. For example, petitioner's evaluation of vacuum cleaners appeared in two issues of CONSUMER REPORTS in 1983 and was later included in the 1984 Buying Guide issue, which was published after the appeal was submitted below. Consumers Union also included the material in its syndicated newspaper columns which are purchased by 300-400 newspapers and its syndicated radio broadcasts. In addition, Consumers Union produces a cable television program containing product reports, sells brief summaries of its findings for use in electronic media, and is seeking to add other revenue producing derivative uses of its original works.

copyright statute gives the copyright owner broad, exclusive control over derivative uses of its copyrighted material. 17 U.S.C. § 106(2). Consideration of harm to potential derivative uses thus is essential in any fair use analysis. As this Court noted in Sony, "[s]ome copyrights govern material with broad potential secondary markets. Such material may well have a broader claim to protection because of the greater potential for commercial harm." 104 S.Ct. at 795 n. 40. Although the petitioner, like many other publishers, relies upon derivative uses to generate needed income to conduct its operations, the Court of Appeals failed to consider the threat to such uses posed by the respondents' infringement.

It is also clear, as the Sony majority noted, that in assessing harm a court must look not only to the particular copying in question but also to the potential adverse effect if the copying "should become widespread." Id. at 793.* And Justice Blackmun referred to the Senate Report on the copyright revision act which stated that (id. at 809):

* See also 3 Nimmer on Copyright § 13.05[A] at 13-65 (1983):

> [I]t is a mistake to view this factor [17 U.S.C. § 107(4)], as do some courts, as merely raising the question of the extent of damages to plaintiff caused by the particular activities of the defendant. This factor poses the issue of whether unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged in by the defendant or by others) would result in a substantially adverse impact on the potential market for or value of plaintiff's work.

> "[i]solated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." 1975 Senate Report 65.

Nonetheless, the Court of Appeals failed to take into account the obviously injurious impact upon petitioner's ability to market its protected writings if other advertisers were to take advantage of the free license granted by the court. Judge Oakes, in dissenting from the denial of rehearing en banc, pointed out the considerable harm widespread copying would have (34a):

> But this defendant's use of Consumers Union's work is not for purposes of criticizing Consumers Union, but for purposes of

> exploiting Consumers Union's favorable critique of its product. Thus, the potential vacuum cleaner buyer, seeing Regina's commercial, and believing that it does not misstate Consumer Reports, need not buy the magazine to find out which vacuum cleaner tested best. Consumer Reports' market among vacuum cleaner buyers is clearly injured. If even a few manufacturers, twenty, for example, do what Regina is allowed to do, a large portion of Consumer Reports' whole market may disappear.

In further disregard of Sony's holdings and contrary to the clear intent of the copyright statute, the Court of Appeals rejected the concept accepted by all the members of this Court in Sony that "[i]t is not the role of the courts to tell copyright holders the best way for them to exploit their copyrights."

104 S.Ct. at 791 n. 28. "Copyright gives the author a right to limit or even to cut off access to his work." Id. at 808 (dissenting opinion).

The Court of Appeals did exactly what this Court said it should not do; it substituted its judgment for Consumers Union's concerning the proper extent and means of exploiting the potential market for Consumers Union's original works.*

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* Consumers Union has decided not to permit advertisers to use its words and expressions because such use, in its view, will diminish the "impressive reputation for independence from industry [which has been] critical to the success of CONSUMER REPORTS" (24a, 41a-42a), and therefore will be harmful to petitioner's long term financial viability. (60a) In Judge Oakes' words (32a-33a) (footnote omitted):

> True, Consumers Union does not sell its product endorsements as, I gather,

(footnote continued on next page)

In the name of increased public access, the Court of Appeals granted a free license to all advertisers to quote from CONSUMER REPORTS (or any other copyrighted work containing "useful

(footnote continued from preceding page)

"Good-Housekeeping" sold its "seal of approval." But Consumers Union potentially could do so, perhaps at considerable profit; the panel's opinion gives all product manufacturers a license, however, to use Consumer Reports' findings -- pro or con -- for nothing.

Equally, if not more important is the fact that Consumers Union does not utilize this potential market in the interests of its own reputation for objectivity and honesty. Evidently it believes that this reputation is worth more -- of greater "value," in the words of the statute -- in the long run than the potential sales of endorsements are in the short run. It is that value which

(footnote continued on next page)

information"), while simultaneously depriving Consumers Union of the benefits of its copyright. As Justice Blackmun noted in Sony, "such an extension risks eroding the very basis of copyright law, by depriving authors of control over their works and consequently of their incentive to create." 104 S.Ct. at 809 (footnote omitted). The decision of the Court of Appeals, which violates virtually every aspect of this Court's

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(footnote continued from preceding page)
the panel's opinion depreciates and which makes defendants' use so unfair.

Indeed, the Court of Appeals went so far as to suggest that advertisers use petitioner's copyrighted expressions in other ways ("periodic advertising in connection with store displays") in order to disseminate Consumers Union's findings to "a wider audience." (11a-12a, n. 4)

analysis in Sony of the fair use exemption, should not be permitted to stand.

CONCLUSION

The effect of the Court of Appeals opinion, in sum, is to turn the concept of fair use on its head. The purpose of the fair use exception is to prevent copyright protection from stifling creativity and inhibiting intellectual freedom by permitting limited copying for "purposes such as criticism, comment, news reporting, teaching..., scholarship or research." 17 U.S.C. § 107.

The Court of Appeals' opinion, however, catapults purely commercial advertising to the top of a list on which it never previously appeared. Suddenly,

the verbatim copying of a copyrighted, non-fiction work for the sole purpose of selling one model of vacuum cleaners has become "the conveyance to consumers of useful information which is protected by the First Amendment" (11a) and exempt from this Court's holding in Sony that commercial use is presumptively unfair. This dramatic rewriting of the law is as harmful to the public interest as it is unprecedented.

Accordingly, petitioner respectfully requests that this Court issue a writ of certiorari to review and reverse the fundamental error of the Court of Appeals.

Dated: New York, New York
May 14, 1984

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of November one thousand nine hundred and eighty-three.

Present: HONORABLE WILLIAM H. TIMBERS,
HONORABLE JON O. NEWMAN,
HONORABLE RICHARD J. CARDAMONE,
Circuit Judges.

CONSUMERS UNION OF UNITED STATES, INC.

Plaintiff-Appellee,

v.

GENERAL SIGNAL CORPORATION and
GREY ADVERTISING, INC.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is REVERSED and the preliminary injunction is VACATED. Opinion will follow. Mandate shall issue forthwith.

[signatures omitted]

APPENDIX B

[CORRECTED COPY]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 522, 541—August Term, 1983

(Argued November 3, 1983 Decided December 6, 1983)

Docket No. 83-7855

CONSUMERS UNION OF UNITED STATES, INC.,

Plaintiff-Appellee,

—v.—

GENERAL SIGNAL CORP. and GREY ADVERTISING, INC.,

Defendants-Appellants.

Before:

TIMBERS, NEWMAN and CARDAMONE,

Circuit Judges.

Appeal from a preliminary injunction entered in the Southern District of New York, Henry F. Werker, *District Judge*, enjoining the broadcast of commercial advertising quoting a CONSUMER REPORTS article on lightweight vacuum cleaners.

Reversed and vacated.

BRUCE D. SOKLER, Washington, D.C. (Charles D. Ferris, Cameron F. Kerry, and Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, Washington, D.C.; Jules P. Kirsch, and Cooper, Dunham, Clark, Griffin & Moran, New York, N.Y.; Joseph M. Burke, and Davis & Gilbert, New York, N.Y., on the brief), *for defendants-appellants.*

MICHAEL N. POLLET, New York, N.Y. (Marshall Beil, Carol A. Schrager, and Karpatkin Pollet Perlmutter & Beil, New York, N.Y., on the brief), *for plaintiff-appellee.*

TIMBERS, *Circuit Judge*:

Appellants General Signal Corporation and Grey Advertising, Incorporated, appeal from a preliminary injunction, entered on October 13, 1983 in the Southern District of New York, Henry F. Werker, *District Judge*, enjoining their broadcast of two television commercials for Regina lightweight vacuum cleaners which quoted from an issue of CONSUMER REPORTS published by appellee Consumers Union of United States, Inc. (Consumers Union or CU). The appeal presents important issues with respect to the interplay of the First Amendment commercial speech doctrine and the fair use defense to a claim of copyright infringement. Issues of trademark, privacy, and state law also are involved.

After a full review, we hold that a preliminary injunction should not have issued. Since we find that Con-

sumers Union has established neither a probability of success on the merits of its copyright, trademark, or state privacy law infringement claims, nor a balance of hardships tipping decidedly in its favor, we vacate the injunction.[1]

I.

CU publishes a monthly magazine, known as CONSUMER REPORTS, which summarizes its independent evaluations of various consumer products. CONSUMER REPORTS prints the following notice in each copy:

> "**Consumers Union accepts no advertising** or product samples and is not beholden in any way to any commercial interest. Its Ratings and product reports are solely for the use of readers of CONSUMER REPORTS. Neither the Ratings nor the reports may be used in advertising or for any commercial purpose. CU will take all steps open to it to prevent such uses of its material, its name, or the name of CONSUMER REPORTS."

In its July 1983 issue, CONSUMER REPORTS evaluated lightweight vacuum cleaners. The Regina Powerteam was "check-rated" and effusively praised in the article. Models are check-rated when CU judges the product tested to be of high overall quality, low price, and appreciable superiority to the non-check-rated models examined. CONSUMER REPORTS' comments regarding this product included:

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[1] In view of the urgency of the matter, on November 25, 1983 we entered an order reversing the order of the district court, vacating the preliminary injunction, directing that the mandate issue forthwith, and stating that an opinion would follow. This is that opinion.

—"*Regina Power Team*—far ahead of the pack in cleaning ability."

—"[O]nly one model, the check-rated *Regina Power Team*, was an adequate substitute for a full-sized vacuum."

—"Only the *Regina Power Team* vacuumed the floor thoroughly."

—"The *Regina Power Team* also stood out in our carpet-cleaning test. It alone left the carpet presentable after only one sweep, pristine after two sweeps."

In addition to publication of this information in its magazine, CU distributed news reports summarizing its test results to between 300 and 400 newspapers, and broadcast it in a "Report to Consumers" over the CBS radio network.

The Regina Powerteam lightweight vacuum cleaner is marketed by the Regina Company (Regina), a division of appellant General Signal Corporation's wholly-owned subsidiary, the General Signal Appliance Corporation. As part of its marketing strategy, Regina and its outside advertising agency, Gray-North, Inc., a division of appellant Grey Advertising, Inc., prepared three half-minute commercial messages for broadcast on television. The first does not mention CONSUMER REPORTS and is not challenged in this litigation.

The second message, entitled "Squid", emphasizes the lightweight convenience of the Regina Powerteam compared to full size vacuums. During one of the many different visual portions of the message, the voice-over announcer states that the Regina Powerteam "is the only lightweight that Consumer Reports says, Quote, was an

adequate substitute for a full-sized vacuum." The statement "Consumer Reports is not affiliated with Regina and does not endorse products" is superimposed on the screen the entire time the CONSUMER REPORTS quotation is mentioned. "Squid" was broadcast on ABC, CBS, and NBC, starting September 27, 1983.

The third message, entitled "Consumer Reports", includes several quotations from CONSUMER REPORTS visually displayed on the screen as they are read by the announcer.[2] As with "Squid", each time material from CONSUMER REPORTS is mentioned, there appears the statement that it is not affiliated with Regina and does not endorse products. This disclaimer appears on the screen for a total of 14 seconds out of the 29.5 second duration of the commercial. The print size used for the disclaimer is comparable with normal television advertising practice for required disclosures and remains on the screen for a longer period of time than is normal for such disclosures. This commercial was never actually broadcast.

Regina notified CU that it planned to broadcast these commercials. It offered to provide copies to CU and to meet to discuss the matter. On the morning of September 30, 1983, Regina received a mailgram from CU demanding that Regina cease and desist from airing its commercials and established a deadline of 3:00 P.M. that day. Counsel for Regina responded but was told that CU already had commenced the instant action. CU's com-

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2 The commercials include the following lines with quoted excerpts from the CONSUMER REPORTS article:

—"Regina Powerteam—far ahead of the pack in cleaning ability."
—Of all the lightweights tested "only one worked well."
—On medium pile carpeting Powerteam "did the job with the least effort."
—In fact, it's the only one Consumer Reports calls an "adequate substitute for a full-sized vacuum."

plaint alleged violations of the Copyright Act, 17 U.S.C. § 101 et seq. (1982); of the Lanham Act, 15 U.S.C. §§ 1114(1) and 1125(a) (1982); of state law, N.Y. Gen. Bus. Law §§ 349, 350, 350-a, 350-d, 368-d, 397 (McKinney 1968 & Supp. 1982); and of common law.[3] CU demanded temporary and permanent injunctive relief, compensatory damages of not less than $5 million, and punitive damages of not less than $5 million.

On October 3, 1983, CU applied for a temporary restraining order. In its papers in support of this application, CU alleged that specific defects in the commercials had a misleading effect. The court granted the T.R.O. over Regina's objections.

Upon receiving CU's motion papers, Regina changed the commercials' disclaimer to state "Consumer Reports is not affiliated with Regina and does not endorse Regina products or any other products". This was to allay CU's concern that the initial wording of the disclaimer might convey the impression that, while CU generally did not endorse products, it had made an exception in Regina's case. Responding to CU's complaint, Regina also revised the voice-over of the "Squid" commercial to insert the word "unquote" at the end of the quotation attributed to CU, and changed the last visual of that message to eliminate pictures of Regina models other than the Powerteam.

On October 7, a hearing was held on the motion for a preliminary injunction. The court heard approximately one-half hour of argument. No testimony was taken. On October 14, the court entered a preliminary injunction enjoining the use of both Regina messages and other

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3 Only the Copyright Act, § 43(a) of the Lanham Act, and §§ 349, 350 and 397 of the New York General Business Law were pressed by CU in the district court.

advertising which copied from CONSUMER REPORTS. In its opinion, the court reached only the copyright issues. It did not address the Lanham Act or state law claims. It summarily denied appellants' First Amendment defense and rejected the fair use defense after weighing the four statutory factors referred to below. The court held that a detailed showing of irreparable injury was unnecessary once the elements of copyright infringement had been established. This expedited appeal followed.

Appellants argue, first, that the commercials are a fair use of copyrighted material and that many of the references to CONSUMER REPORTS are facts not protected by copyright; second, that neither the Lanham Act nor state law provides a basis for enjoining a truthful and accurate report of CU's article; and, third, that Regina will sustain irreparable injury if the injunction remains in effect, that CU has proven no irreparable injury, and that the public interest is adversely affected by the injunction. We shall consider each of these arguments seriatim.

II.

Since the district court reached its decision solely on the pleadings, briefs, affidavits, and counsels' arguments—without taking testimony—we have undertaken a full review to determine whether injunctive relief is appropriate. *Jack Kahn Music Co.* v. *Baldwin Piano & Organ Co.*, 604 F.2d 755, 758 (2 Cir. 1979).

A preliminary injunction will issue only where the moving party "establishes possible irreparable injury and either (1) probable success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor." *Dallas Cowboys*

Cheerleaders, Inc. v. *Pussycat Cinema, Ltd.*, 604 F.2d 200, 206-07 (2 Cir. 1979).

We shall consider first CU's claimed likelihood of success on the merits.

A.

CU's copyright on the July 1983 issue of CONSUMER REPORTS has not been challenged. Some copying of copyrighted material, however, without the owner's consent is permitted. The fair use doctrine "balances the public interest in the free flow of ideas with the copyright holder's interest in the exclusive use of his work." *Warner Bros., Inc.* v. *American Broadcasting Companies, Inc.*, ____F.2d ____, ____ (2 Cir. 1983), slip op. 6862, 6882 (Oct. 6, 1983). Fair use is a codification of the decisional law in an effort to prevent rigid application of the Copyright Act where such application would unreasonably prevent the dissemination of information.

The Copyright Act states the fair use doctrine as follows:

> "[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non profit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work."

17 U.S.C. § 107 (1982). Each of these factors contributes to the factual determination of what constitutes fair use. We shall consider each in turn.

(1)

The first factor focuses on the purpose and character of the use. Although the purpose of Regina's use undoubtedly is commercial, this fact alone does not defeat a fair use defense. *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5 Cir. 1980). Almost all newspapers, books and magazines are published by commercial enterprises that seek a profit. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2 Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

The distinction between "commercial nature" and "non profit educational purposes" is merely illustrative of what is included in assessing the core of the criterion, which is the purpose and character of the use. Regardless of motive, the "character" of Regina's ads includes the conveyance to consumers of useful information which is protected by the First Amendment. As the Supreme Court recognized in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), commercial uses also serve the important function of educating the public. The information about lightweight vacuums in CONSUMER REPORTS is of significant public interest. Broadcast of Regina's ads will increase significantly the number of people exposed to CU's evaluation.[4]

[4] In addition to reaching a wider audience through television, repetition of CU's findings serves an information function. People tend to

Some infringement actions involve the copying of creative expression of a copyrighted work for the purpose of having that precise form of expression advance someone else's commercial interests—for example, using well-known copyrighted lines to attract attention to an advertisement. *D.C. Comics, Inc.* v. *Crazy Eddie, Inc.*, 205 U.S.P.Q. 1177 (S.D.N.Y. 1979), cited with approval in *Warner Bros.*, *supra*, at slip op. 6882. In some circumstances copying of that sort may not constitute fair use. On the other hand, in some circumstances an advertiser may copy some excerpts from a copyrighted work for the purpose of having the content of the work advance his commercial interests. Since the purpose is to report factual information, as in the instant case, it is more conducive to the concept of fair use.

(2)

The second factor to be considered is the nature of the copyrighted work. CONSUMER REPORTS is primarily informational rather than creative. Since the risk of restraining the free flow of information is more significant with informational work, the scope of permissible fair use is greater. *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, *supra*, 366 F.2d at 307; 3 Nimmer on Copyright § 13.05[A][2] at 13-61 (1982).

Facts cannot be copyrighted. 17 U.S.C. § 102(b). CU cannot prevent Regina from accurately reporting facts about the results of CU's independent testing, irrespective of Regina's motive in doing so. Regina wants to communicate CONSUMER REPORTS' favorable rating of its product. Regina uses CU's words in the interest of ac-

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forget information presented in books and newspapers when it comes time to buy the item. Periodic advertising in connection with store displays presents the information in a form which aids retention.

curacy, not piracy. Where an evaluation or description is being made, copying the exact words may be the only valid way precisely to report the evaluation. *Morrissey* v. *Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1 Cir. 1967).

In *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 723 F.2d 195 (2 Cir. 1983), ~~slip op. 169 (Nov. 17, 1983)~~, we recently approved a fair use defense in a case involving President Ford's memoirs. Some of the article describing the Ford memoirs was paraphrased; other parts were taken verbatim from a pre-publication copy of the book obtained by Nation magazine. We held that the paraphrasing was not subject to Harper & Row's copyright because the content was factual and concerned a matter of great public importance. We also permitted use of actual quotations. Implicit in that decision is an acknowledgement that, where accurate reporting requires use of verbatim quotations, fair use will be liberally applied. The scope of the doctrine is undoubtedly wider when the information conveyed relates to matters of high public concern. But the doctrine has some application to communicating information pertinent to consumer choices.[5]

In truth, CU is not really objecting to Regina's copying CU's expression. The statement of policy in its magazine and its position in its brief before us is that *any* mention of CU in commercial advertising will diminish its effectiveness as an unbiased evaluator of products.[6]

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5 Indeed, CU, recognizing the public interest in the flow of its information, has successfully invoked First Amendment protections to avoid its own liability for allegedly false product disparagement. *See Bose Corp.* v. *Consumers Union of United States, Inc.*, 692 F.2d 189 (1 Cir. 1982), *cert. granted*, 51 U.S.L.W. 3774 (Apr. 25, 1983).

6 We think CU's fear that consumers will assume that Regina purchased a CU endorsement is exaggerated, *see Consumers Union of United States, Inc.* v. *Hobart Manufacturing Co.*, 189 F. Supp. 275,

(3)

The third factor to consider is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. "Squid" uses one phrase; "Consumer Reports" borrows 29 words. In relation to the CONSUMER REPORTS magazine article (2100 words), both commercials make relatively insubstantial use of CU's work.

(4)

The fourth factor to consider in evaluating fair use is "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). This factor is "widely accepted to be the most important." *Triangle Publications v. Knight-Ridder Newspapers*, *supra*, 626 F.2d at 1177.

The district court accepted CU's argument and stated that "Regina's commercial use of the article could be the demise of Consumers Union since such commercial use could lead the public to view Consumers Union as [an] unfair tester of products." *Consumers Union of United States, Inc.* v. *General Signal Corp.*, 83 Civ. 7209 (S.D.N.Y. Oct. 12, 1983) at 11. We believe that this conclusion is based on a faulty premise. The Copyright Act was not designed to prevent such indirect negative effects of copying. The fourth factor is aimed at the

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278-79 (S.D.N.Y. 1960), and at least unsupported by the present record. Regina would not want to quote CU if that were an accurate depiction of public reaction. Regina benefits from public perception of CU as an unbiased evaluator.

Instead, Regina in effect is saying that it believes that the viewing public places great stock in what CONSUMER REPORTS has to say. In this way, the use of such statements and the credit given to CONSUMER REPORTS actually may reinforce a positive public perception of the magazine.

copier who attempts to usurp the demand for the original work. *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2 Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Rubin* v. *Boston Magazine Co.*, 645 F.2d 80, 84 (1 Cir. 1981); *Quinto* v. *Legal Times of Washington, Inc.*, 506 F. Supp. 554, 560 (D.D.C. 1981). The copyright laws are intended to prevent copiers from taking the owner's intellectual property, *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), and are not aimed at recompensing damages which may flow indirectly from copying.

Our approach in literary criticism cases illustrates this distinction. A reviewer excerpts parts of a story and then severely criticizes it. The fourth fair use factor will come into play if too much is copied or if the entire plot is revealed, thereby usurping the demand for the original work. A court would not find it relevant in deciding the fair use question, however, that evidence might show that the devastating critique had diminished sales by convincing the public that the original work was of poor quality. Both instances of copying result in decreased sales and popularity of the original work, but only the former lies within the scope of copyright protection.[7] *Dow Jones & Co.* v. *Board of Trade of the City of Chicago*, 546 F. Supp. 113, 121 & n.9 (S.D.N.Y. 1982); *The New York Times Co.* v. *Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 223 (D.N.J. 1977) (presumption that use by a non-

[7] There are alternate forms of relief where copying results in a negative effect which is not an usurpation of plaintiff's original market. The only alleged injury which CU truly presses is that Regina's use may lead to public perception of *endorsement*. Truthful excerpting of CU's ratings cannot hurt CU *unless* the public perceives that CU sponsored the use. In such a case, § 43(a) of the Lanham Act and the privacy statutes which prevent unauthorized product endorsements are more appropriate. CU will have an opportunity to offer proof on this issue at trial and establish this aspect of its § 43(a) claim if it can.

competitor will not injure market for copyrighted material); *Life Music, Inc. v. Wonderland Music Co.*, 241 F. Supp. 653, 656-57 (S.D.N.Y. 1965) (a tighter standard of irreparable injury applies where works do not compete). The theory behind the copyright laws is that creation will be discouraged if demand can be undercut by copiers. Where the copy does not compete in any way with the original, this concern is absent.

Not only are we faced with a claim of injury which does not stem from competition between the copyright owner and the copier, but the owner does not even allege injury to any work currently copyrighted. Rather, it is the value of possible *future* issues of CONSUMER REPORTS which CU seeks to protect. This clearly does not involve the fourth factor which focuses upon the effect of the use upon the potential market for or value of *the copyrighted work*. 17 U.S.C. § 107(4).

Applying the proper test to determine whether Regina's use usurps demand for the July 1983 CONSUMER REPORTS issue, we find no convincing evidence of a significant deleterious effect. Back issues are available for purchase, but probably few people would order the July issue solely because of its evaluation of lightweight vacuum cleaners. Those who do probably will not be deterred by watching Regina's commercials.

Based on our examination of the four statutory factors, we hold that CU has failed to establish likelihood of success on the merits and that the district court erred in holding that the Copyright Act warranted injunctive relief.

B.

Although the district court relied solely on the Copyright Act in issuing a preliminary injunction, CU is entitled to assert its other claims in support of an injunction. *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435 (1924). We turn first to CU's claims under the Lanham Act.

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), proscribes both express and implied false representations made in connection with the sale of goods and renders the maker of any such representations liable to those damaged by the misrepresentations.[8] CU asserts that Regina's ads are false and misleading in three respects.

First, it claims that the ads convey the false impression that CONSUMER REPORTS' review of the Powerteam was exclusively favorable.[9] Although CU check-rated the Powerteam, it did note that its dust-holding capacity was

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8 15 U.S.C. § 1125(a) provides:

> "Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

9 There is a conflict between CU's position here and with respect to its fair use claim: there, it argues that Regina has appropriated CU's entire product; here, it argues that Regina did not copy enough.

not good and found other minor defects.[10] The Lanham Act protects against distortion through selective excerpting. *Amana Refrigeration, Inc.* v. *Consumers Union of United States, Inc.*, 431 F. Supp. 324 (N.D. Iowa 1977). As a factual matter, however, Regina's ads do not convey the impression that CU's review was wholly favorable. Rather, they merely convey an accurate impression that CU concluded that the Powerteam lightweight vacuum was superior to others tested. CU virtually admits that the negative factors were of little consequence: the November issue of CONSUMER REPORTS lists the Powerteam as a "Best Buy Gift" with no negative qualifications.

Second, CU asserts that Regina's original ads conveyed the false impression that CU's favorable review applied to the entire Regina line, when in fact models other than the Powerteam were not rated so highly. We question the accuracy of this assertion. The Powerteam is the only machine shown and named during the commercial. A group picture of the other models flashes rapidly past the viewer's eyes only at the very end. In any event, Regina already has changed the commercial. The question, at least with respect to preliminary injunctive relief, is moot.[11]

Third, CU objects to the failure of the commercial announcer to close the quotation from CONSUMER REPORTS. Instead of saying "unquote" following the ex-

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10 The original article in CONSUMER REPORTS faulted the Powerteam's capacity; gave it a "poor" rating in "edge cleaning" of medium pile carpets, in "initial suction", and in "emptying convenience"; and gave it a "fair" rating in noise and in cleaning bare floors and deep pile carpet.

11 Not only has Regina offered to change the commercial, but it has actually done so. CU's argument that an offer to change does not moot an injunction is inapposite.

cerpt, the announcer continues with the rest of the commercial text. We think it unlikely that viewers would attribute to CU the voice-over statements "Why wrestle with an ordinary vacuum when there's Powerteam? One fine Electrikbroom cleaner from Regina". Again, Regina has changed the commercial to include the word "unquote"; so the issue is moot.

In addition to prohibiting false representations, § 43(a) of the Lanham Act also proscribes advertisements which are not technically false, but which lead to a mistaken public belief that "the mark's owner sponsored or otherwise approved the use." *Dallas Cowboys Cheerleaders, supra*, 604 F.2d at 205. A preliminary injunction will issue where an advertisement creates a reasonable likelihood of confusion by consumers regarding the origin or sponsorship of the product. *Societe Comptoir de L'Industrie Cotonniere Etablissements Boussac* v. *Alexander's Department Stores, Inc.*, 299 F.2d 33, 36 (2 Cir. 1962); *Cuisinarts, Inc.* v. *Robot-Coupe International Corp.*, 509 F. Supp. 1036, 1044 (S.D.N.Y. 1981).

On this record Regina's ads have not been shown to give rise to reasonable likelihood of confusion regarding source or sponsorship. The record is devoid of any evidence of actual confusion. The only evidence relating to consumer confusion is the conclusory affidavit of CU's own Executive Director. We are satisfied that the disclaimer is adequate to distance CU and Regina.

CU asserts that the visual disclaimer—"Consumer Reports is not affiliated with Regina and does not endorse Regina products or any other products"—cannot cure the false public perception of an association between CU and Regina. CU argues that only a total ban on use of its name in advertising will achieve this objective.

Disclaimers are a favored way of alleviating consumer confusion as to source or sponsorship. *Champion Spark Plug Co.* v. *Sanders*, 331 U.S. 125, 130 (1947); *Societe Comptoir, supra*, 299 F.2d at 36. Absolute prohibitions of speech as provided for in the instant preliminary injunction are improper where there is any possibility that an explanation or disclaimer will suffice. *In re R.M.J.*, 455 U.S. 191, 203 (1982). There, in a slightly different context (attorney advertising), the Supreme Court held that the government "may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive. . . . [T]he remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation." *Id.*

A factual pattern similar to the instant case was presented to the court in *Better Business Bureau of Metropolitan Houston, Inc.* v. *Medical Directors*, 681 F.2d 397 (5 Cir. 1982). There a weight-loss clinic advertised that a BBB "spy" had concluded that the program "really works". Like CU, the Better Business Bureau's reputation depends on the public's perception that it is totally independent from industry. It promptly commenced an action to enjoin further mention of its name in advertisements. Even though the court agreed that the ad was misleading, it held that the injunction forbidding all use of the words "Better Business Bureau" in appellant's advertising violated the First Amendment. The court modified the injunction to forbid only language suggesting that the BBB had endorsed the clinic and to require a disclaimer to that effect.

The district court in the instant case erred in enjoining Regina from making any reference to the favorable CON-

SUMER REPORTS rating. If the record truly evinced a likelihood of consumer confusion (which it does not), the proper course would have been to require a clear disclaimer. The First Amendment demands use of a disclaimer where there is a reasonable possibility that it will suffice to alleviate consumer confusion.

Turning to Regina's disclaimer in the instant case, of course an inadequate disclaimer would be no defense, *Dallas Cowboys Cheerleaders, supra*, 604 F.2d at 205. Here there was no evidence that the disclaimer was inadequate. The court in *Better Business Bureau, supra*, 681 F.2d at 406, found that a similar disclaimer was sufficient to protect the Better Business Bureau's interests in maintaining its reputation for impartiality. Presumably the disclaimer printed in each issue of CU's magazine dissuades the readers of CONSUMER REPORTS from concluding that CU is affiliated with the companies whose products it reviews. In view of its faith in the efficacy of its own disclaimer, CU's position that *no* disclaimer by Regina would be sufficient to prevent consumer confusion does not ring true. In any event, its extreme position is not supported by the evidence.

We hold that § 43(a) of the Lanham Act and the corresponding claims under state law[12] provide no support for the preliminary injunction.[13]

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12 CU argues that §§ 349 and 350 of the New York General Business Law provide an appropriate ground on which to base injunctive relief. For the reasons stated above, we hold that Regina's ads have not been shown to be "misleading in a material respect".

13 Our conclusion that CU has not presented a serious question on the merits of the Lanham Act claim warranting injunctive relief is consistent with the judgments of courts in prior cases that CU's trademark claims were too doubtful to warrant injunctive relief, even where the advertising involved was deceptive and presented a far greater potential for confusion than does Regina's. *See Amana Refrigeration, Inc.* v.

C.

This brings us to CU's privacy claims.

Section 397 of the New York General Business Law prohibits use of the name of a non-profit corporation for advertising purposes without first obtaining written consent.[14] We do not believe that the legislature intended that § 397 should apply to a situation where the non-profit corporation's business is that of evaluating products and where it widely disseminates the results. Not only does CONSUMER REPORTS favorably assess the Regina Powerteam,[15] but it attempts to spread this assessment through newspapers and radio announcements. The purpose of

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Consumers Union of United States, Inc., 431 F. Supp. 324 (N.D. Iowa 1977) (brochure quoted favorable 1968 CONSUMER REPORTS rating and ignored unfavorable 1973 CONSUMER REPORTS article); *Consumers Union of United States, Inc.* v. *Theodore Hamm Brewing Co.*, 314 F. Supp. 697 (D. Conn. 1970) (advertising claimed CU rated Hamm's beer "first" among "beers Americans like best" when only certain beers were tested and Coors received a rating equal to Hamm's).

14 N.Y. Gen. Bus. Law § 397 in relevant part provides:

"1. No person, firm, association or corporation shall use, for advertising purposes or for purposes of trade, the name, symbol, device or other identification of any non-profit corporation, association, society or organization organized exclusively for religious, benevolent, humane, charitable, educational . . . purposes . . . without having first obtained the written consent of such non-profit corporation, association, society or organization. Any violation of this section shall be a misdemeanor.

* * *

3. Whenever there shall be an actual or threatened violation of subdivision one of this section, the corporation, association, society or organization affected thereby may maintain an equitable action in the supreme court of this state to prevent and restrain said actual or threatened violation . . . ."

15 The magazine would have a very small circulation if consumers bought it only out of intellectual curiosity and not to rely upon it in selecting their purchases.

§ 397 and similar state statutes is to protect the right to privacy. By going public with its views, CU places itself in a position where its privacy is not infringed when these views are repeated.

Absent state decisional law to the contrary, we hold that § 397 is not intended to bar the use of the name of a non-profit corporation where it injects itself into the commercial world by publicly evaluating commercial products.

D.

Since CU has failed to establish a likelihood of success on the merits, there remains to be determined whether it has shown sufficiently serious questions going to the merits to make them a fair ground for litigation and whether there is a balance of hardships tipping decidedly in its favor.

In balancing the hardship to CU stemming from continued telecast of the commercials with the hardship to Regina attendant on maintenance of the injunction, we hold that CU has not sustained its burden of showing that the equities lie in its favor. The only evidence introduced by CU on the issue of hardship is the affidavit of Rhoda Karpatkin, Executive Director of CU, which states: "[e]ach broadcast hurts Consumers Union deeply. Each broadcast destroys more and more of the untainted reputation for impartiality and freedom from commercial bias which we have painstakingly spent forty-seven years in acquiring."[16]

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16 This reputation nevertheless appears to have grown despite past uses of CU's name which it has not succeeded in enjoining. *Consumers Union of United States, Inc.* v. *Theodore Hamm Brewing Co., supra* note 13, 314 F. Supp. at 701; *Consumers Union of United States, Inc.* v. *Hobart Manufacturing Co.*, 189 F. Supp. 275 (S.D.N.Y. 1960).

It is undeniable that CU has built an impressive reputation for independence from industry and that this reputation may be critical to the success of CONSUMER REPORTS. Nevertheless, too great an inferential leap is required to go from acknowledgement of this reputation to the conclusion that Regina's use, *accompanied by the disclaimer*, will injure CU's reputation significantly. Regina's use of an explicit disclaimer makes CU's conclusory claims of harm unacceptable. *Stop the Olympic Prison* v. *United States Olympic Committee*, 489 F. Supp. 1112, 1123 (S.D.N.Y. 1980). Much like the court presented with a poster of a pregnant Girl Scout captioned "Be Prepared", we doubt that CU's reputation faces imminent collapse. *Girl Scouts of the United States of America* v. *Personality Posters Mfg. Co.*, 304 F. Supp. 1228 (S.D.N.Y. 1969).

Balanced against the lack of concrete evidence of harm to CU, there is substantial evidence of potential harm to Regina from maintenance of the injunction. The further removed Regina's ads become from the date of CU's publication, the less significant an impact the advertising will have on the market. *Consumers Union of United States, Inc.* v. *Theodore Hamm Brewing Co., supra* note 13, 314 F. Supp. at 701. The highly competitive nature of the lightweight vacuum cleaner market makes effective pre-Christmas advertising essential to Regina.

We conclude that CU has failed to establish a likelihood of success on the merits and has failed to establish that the equities clearly favor CU. Accordingly, we confirm our order entered November 25, 1983 reversing the order of the district court, vacating the preliminary injunction, and directing that the mandate issue forthwith.

Costs to appellants.

Reversed and vacated.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of February one thousand nine hundred and eighty-four.

Present: HONORABLE WILLIAM H. TIMBERS,
HONORABLE JON O. NEWMAN,
HONORABLE RICHARD J. CARDAMONE,
Circuit Judges.

CONSUMERS UNION OF UNITED STATES, INC.

Plaintiff-Appellee,

v.

GENERAL SIGNAL CORPORATION and GREY ADVERTISING, INC.,

Defendants-Appellants.

83-7855

ORDER ON PETITION FOR REHEARING ADDRESSED TO PANEL AND MOTION TO ENLARGE RECORD

Appellee having filed on December 16, 1983 a petition for rehearing seeking (a) reconsideration of

our order of November 25, 1983 vacating the preliminary injunction as confirmed by our opinion of December 6, 1983 and (b) "supplementation of the record" to admit an 8 page affidavit of one Rhoda H. Karpatkin, sworn to December 15, 1983, together with 29 pages of "exhibits" attached to her affidavit (the said Rhoda H. Karpatkin previously having submitted in the district court an affidavit sworn to October 3, 1983 in support of appellant's motion for a preliminary injunction); and

The Court having given due consideration to appellee's petition for rehearing and motion to enlarge the record, it is now

ORDERED as follows:

(1) Appellee's petition for rehearing addressed to the panel is granted to the extent that the panel opinion is hereby revised in the following respects:

(a) Page 476, 10th line from bottom

Beginning with "There is a ...", the last ten lines on the page are deleted.

(b) Page 482, line 8

Change "freely" to "widely".

(c) Page 483, line 1

Delete the word "gratis".

(2) Appellee's petition for rehearing in all other respects is hereby denied.

(3) Appellee's motion to enlarge the record, as set forth in the last sentence of the second footnote on the third page of the petition for rehearing, is hereby denied in all respects.

[signatures omitted]

APPENDIX D

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 14th day of February, one thousand nine hundred and eighty-four.

No. 83-7855, 83-7859

CONSUMERS UNION OF THE UNITED STATES, INC.,

Plaintiff-Appellee,

v.

GENERAL SIGNAL CORP., and GREY ADVERTISING, INC.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, Consumers Union of the United States, Inc., and the panel that heard the appeal having granted in part and denied in part said petition for rehearing in an order filed on February 14, 1984.

It is further noted that a poll of the judges in regular active service having been taken on the suggestion for

rehearing in banc and there being no majority in favor thereof, rehearing in banc is DENIED.

A. Daniel Fusaro, Clerk

/s/ FRANCIS X. GINDHART
by Francis X. Gindhart,
Chief Deputy Clerk

OAKES, *Circuit Judge* (dissenting):

I dissent from the denial of the petition for rehearing en banc in this case, reported as *Consumers Union of United States, Inc. v. General Signal Corp.*, No. 83-7855, slip op. 463 (2d Cir., Dec. 6, 1983). This case is the first to permit a manufacturer to use in its advertising copyrighted consumer research findings by a concern whose product consists of publication of those findings in its magazine, its syndicated news reports, and its broadcasts. It misapplies the doctrine of commercial free speech and takes the heart out of the "fair use" doctrine, codified in 17 U.S.C. § 107 (Supp. V 1981). In so doing, it permits the appropriation without compensation of another's statutorily secured intellectual property, thereby acting as a disincentive to consumer research, and is therefore injurious to the public interest.

The copyright statute, set out in the margin,[1] excludes fair use from copyright infringement, but circumscribes

[1] 17 U.S.C. § 107 provides:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or

fair uses to uses "such as criticism, comment, news reporting, teaching . . ., scholarship, or research. . . ." The use of copyrighted material in television advertising is none of these; nor is it of the same character as these uses. Thus, I believe that such use should not have been approved under the fair use exception.

The statute mentions four factors for determining whether a particular use is "fair." The first of these, the "purpose and character of the use," clearly cuts against a finding of fair use in this case. The use here was clearly "of commercial nature," and not for "nonprofit educational purposes." While this court has rejected the proposition that "copying for commercial gain may never be fair use," *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 308 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), it is very clear that use solely for commercial purposes is presumptively unfair. *Sony Corp. of America v. Universal City Studios, Inc.*, 52 U.S.L.W. 4090, 4098 & n.32, 4099, 4100 n.40 (U.S. Jan. 17, 1984). Moreover, advertising is the least favored commercial use. *See* 3 *Nimmer on Copyright* § 13.05[A] at n.24 (1983).

The second statutory factor is "the nature of the copyrighted work." Here that work consists of the evalua-

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phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

tion with comment of consumer tests and research, representing "a substantial investment of time and labor made in anticipation of a financial return." *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981) (citing *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978)). Although Consumer Reports may not be creative, imaginative, or original in the same way that a play or novel may be, *see New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977), it still is much more than a catalog, index, or other compilation. Consumer Reports involves original, sometimes creative research, and a certain amount of imagination as to what subjective and objective factors consumers deem important.

The third factor is the "amount and substantiality of the portion used in relation to the copyrighted work as a whole." Here the panel is on its strongest ground, but the copying of the essence of the findings as to one product is certainly substantial. *Cf. Roy Export Co. v. Columbia Broadcasting System Inc.*, 503 F. Supp. 1137 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982) (copying of one minute and fifteen seconds from one hour twelve minute motion picture held quantitatively substantial so as to preclude fair use defense). The conclusions quoted by Regina are both the essence of Regina's television commercial and the essence of the Consumers Union vacuum cleaner findings as reported in Consumer Reports.

The fourth factor is "the effect of the use upon the potential market for or value of the copyrighted words." Here the panel's opinion does not sufficiently recognize that it is the potential market, not the actual market, that is at stake in this case. True, Consumers Union does not sell its product endorsements as, I gather, "Good-House-

keeping" sold its "seal of approval." But Consumers Union potentially *could* do so, perhaps at considerable profit; the panel's opinion gives all product manufacturers a license, however, to use Consumer Reports' findings—pro or con—for nothing.[2]

Equally, if not more important is the fact that Consumers Union does *not* utilize this potential market in the interests of its own reputation for objectivity and honesty. Evidently it believes that this reputation is worth more—of greater "value," in the words of the statute—in the long run than the potential sales of endorsements are in the short run. It is that value which the panel's opinion depreciates and which makes defendant's use so unfair. The idea that "Regina would not want to quote" Consumers Union if the public was likely to think that Regina simply purchased its endorsement, expressed in the court's opinion, slip op. at 474 n.6, to answer this point is simply unpersuasive when seen in the light of a number of product sellers' quoting favorable Consumers Union findings (or their competitors quoting negative findings), all as licensed by the opinion of the court.

Finally, the panel suggests that the copyright laws aim to protect against competitors' copying, rather than against damages flowing indirectly from copying, as in the case of dramatic criticism. *Id.* at 474-75. Concededly, the different functions performed by the words in ques-

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2 3 *Nimmer on Copyright* § 13.05[A][4] at 13-65 states:

> It is submitted, however, that it is a mistake to view this factor, as do some courts, as merely raising the question of the extent of damages to plaintiff caused by the particular activities of the defendant. This factor rather poses the issue of whether unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged in by the defendant or by others) would result in a substantially adverse impact on the potential market for or value of the plaintiff's work.

tion are relevant, *see* 3 *Nimmer on Copyright* § 13.05[B], and the defense of fair use "is most universally recognized in connection with the function of criticism, and review." *Id.* at 13-70. But this defendant's use of Consumers Union's work is not for purposes of criticizing Consumers Union, but for purposes of exploiting Consumers Union's favorable critique of its product. Thus, the potential vacuum cleaner buyer, seeing Regina's commercial, and believing that it does not misstate Consumer Reports, need not buy the magazine to find out which vacuum cleaner tested best. Consumer Reports' market among vacuum cleaner buyers is clearly injured. If even a few manufacturers, twenty, for example, do what Regina is allowed to do, a large portion of Consumer Reports' whole market may disappear.

I obviously think the panel wrongly decided this case. I also think it sufficiently important to warrant en banc consideration not only because "fair use" is one of, if not the most, difficult areas of copyright law, but also because the use of "commercial free speech" to justify a fair use defense to copyright infringement stands either the copyright law or the First Amendment on its head. A use for commercial purposes, the opinion suggests, is *more* entitled to the fair use defense than a use that is not. At the very least the panel opinion reads the presumption against the fairness of commercial use out of the statute. Doing so in the name of the First Amendment, I fear, cheapens that Amendment's coin.

For the foregoing reasons, I respectfully must dissent from the denial of a rehearing en banc in this case.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSUMERS UNION OF UNITED STATES, INC.

Plaintiff,

-against-

GENERAL SIGNAL CORP. and
GREY ADVERTISING, INC.,

Defendants.

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83 Civ. 7209 (HFW)

ORDER FOR PRELIMINARY INJUNCTION

This cause having come on to be heard on plaintiff's application dated October 3, 1983 for an order to show cause for a preliminary injunction and a temporary restraining order and said temporary restraining order having been issued on October 3, 1983, and the Court having considered the pleadings, moving

affidavits, briefs, and having heard the oral arguments of the parties at a hearing in open court held on October 7, 1983, and it appearing to the Court after deliberation that defendants are engaged in committing and will continue to commit certain of the acts of which plaintiff complains, to the irreparable injury of the plaintiff, and upon the memorandum of decision filed by this Court on October 12, 1983 it is hereby

ORDERED, that defendants, their officers, directors, agents, servants, employees, attorneys, and all persons in active concert or participation with them be and they hereby are restrained and enjoined, pending the determination of this action, from:

1. Further broadcasting, displaying or exhibiting publicly, publishing or distributing in any manner whatsoever defendants' television advertising commercials entitled "CONSUMER REPORTS" and "Squid Rev." which copy material from plaintiff's duly copyrighted article on "Lightweight Vacuum Cleaners" appearing in the July 1983 issue of CONSUMER REPORTS magazine or any other form of advertising which similarly copies material from plaintiff's copyrighted article; and it is further

ORDERED, that the security in the amount of $5,000.00 posted by the plaintiff on October 4, 1983 shall be proper for the payment of such costs and damages as may be incurred or suffered by

any party who is found to have been wrongfully enjoined or restrained.

Dated: New York, New York
October 13, 1983

s/_____
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSUMERS UNION OF UNITED STATES, INC.

Plaintiff,

-against-

GENERAL SIGNAL CORP. and
GREY ADVERTISING, INC.,

Defendants.

MEMORANDUM DECISION

83 Civ. 7209 (HFW)

Dated: 10/12/83

1075

APPEARANCES: [omitted]

HENRY F. WERKER, D. J.

This is a motion by plaintiff Consumers Union of United States, Inc. (Consumers Union) for a preliminary injunction restraining defendants'

broadcast of two television commercials for Regina lightweight vacuum cleaners. Plaintiff contends, among other things, that the commercials infringe its copyright, are false and misleading in violation of section 43(a) of the Lanham Trademark Act, make unauthorized use of its trademark, "Consumer Reports", and violate section 397 of the New York General Business Law. The complaint was filed on September 30, 1983. A temporary restraining order was issued by the court on October 3, 1983.

Consumers Union was organized under the New York not-for-profit corporation law. It is a leading independent consumer research and testing organization. Its main purpose is to educate the public about different

products and services. The advice given consumers is based principally on Consumers Union's expert testing of product samples or services. Consumers Union accepts no products from manufacturers. The items tested are purchased at retail at market prices. The results of the tests are made known to the public through the monthly magazine "Consumer Reports", which has a wide circulation. Each issue of "Consumer Reports" is copyrighted and the name is a registered trademark belonging to Consumers Union. Virtually all of the income of Consumers Union is derived from the sale of "Consumer Reports". No advertising is accepted for "Consumer Reports" or any other Consumers Union publication. Basic to the success of

Consumers Union is its reputation as an impartial tester of products of competing manufacturers. Consumers Union has a policy of complete independence from commercial interests and insists that no commercial use be made of its reports. Each issue of "Consumer Reports" states that the ratings and findings set forth in the publication may not be used in advertising.

Consumers Union's reputation for publishing unbiased information and the goodwill it has acquired over the years are its most important assets. Therefore, it is understandable that the plaintiff seeks to safeguard its good name by enjoining any unfair commercialization of its published reports.

Consumers Union contends that the defendants are doing irreparable damage to its reputation by nationally broadcasting commercials which it contends infringe its copyright. The Regina Company (Regina) is a division of the General Signal Appliance Corporation which is a wholly-owned subsidiary of defendant General Signal Corporation. Regina's principal business is the manufacture of lightweight, upright vacuum cleaners, sold under the Regina and Electrikbroom trademarks. Defendant Grey Advertising, Inc. prepared the commercials in question.

The July 1983 issue of "Consumer Reports", at pages 369-71, contains an article reporting on Consumers Union's evaluations of eighteen models of

lightweight vacuum cleaners. Included in the tests, were four models manufactured by Regina. One, the "Regina Electrikbroom Powerteam HB6910" was judged to be the best of all models tested. Though the article found certain faults with it, this model was "check-rated". Models are "check-rated" by "Consumer Reports" when the engineers determine the samples to be of high quality and markedly superior to non-checked models. The other three Regina models that were tested were each rated below the models of several competing manufacturers on the ratings chart in which comparison of the products of the manufacturers were made.

The July issue of "Consumer Reports" was placed for sale on

newsstands in June 1983. On June 28, Consumers Union received a telephone call from Jeffrey Mednick, an attorney representing defendant General Signal Corporation. Mednick was referred to the law firm of Karpatkin, Pollet, Perlmutter & Beil, counsel for plaintiff in this lawsuit. He states in his affidavit that he was not seeking permission for Regina to use the article. He says that he was only seeking guidance as to Consumers Union's policy on quotations from "Consumer Reports". In any event, it is undisputed that permission was not given to Regina by Consumers Union to make commercial use of the July article on lightweight vacuum cleaners. On September 27, 1983, Consumers Union received a letter from Donald Sheelen,

president of The Regina Company. This letter stated that Regina had begun television commercials which would use segments of the July article. On September 28, Regina provided the attorneys for Consumers Union with a videotape of Regina's two commercials. This tape was viewed by Rhoda Karpatkin, Executive Director of Consumers Union, who, after viewing it, sent a telegram to Regina demanding withdrawal of the commercials. The defendants refused to comply contending that the commericals do not infringe any copyrights, constitute fair use and are not false or misleading.

One of the commercials, which defendants call "Consumer Reports", consists of quotations taken from the

July 1983 "Consumer Reports" article on lightweight vacuum cleaners, to wit:

> And CONSUMER REPORTS states,
> "Regina Powerteam -- far ahead of the pack in cleaning ability."
> Of all the lightweights tested
> "only one worked well."
> On medium pile carpeting
> Powerteam "did the job with the least effort."
> In fact, its the only one
> CONSUMER REPORTS calls an
> "adequate substitute for a full-sized vacuum."

The underlined phrases are the quotations.

The text of each quotation is read aloud by the announcer and also simultaneously appears on the television screen in print. Each quotation is further framed on the screen by the following statement:

> CONSUMER REPORTS
> [text of quotation]
> CONSUMER REPORTS is not affiliated with Regina and does not endorse products.

The second commercial is also thirty seconds long and is called "Squid". It contains the following excerpt from the July 1983 issue of "Consumer Reports" (the underlined portion is the quotation):

> It's the only lightweight that CONSUMER REPORTS says, quote, <u>was an adequate substitute for a full-sized vacuum</u>. Why wrestle with an ordinary vacuum cleaner when there's Powerteam. One fine Electrikbroom from Regina.

In this commercial, the text does not appear on the screen but the subtitle "CONSUMER REPORTS is not affiliated with Regina and does not endorse products" appears as the quotation is read aloud by the television announcer.

The two ending sentences are not from the July issue of "Consumer Reports". Consumers Union contends that the viewer is led to believe otherwise while being shown a picture of four different vacuum cleaners. Regina states that it is willing to respond to those concerns of the plaintiff as it can without compromising its own legitimate interests. Accordingly, Regina is revising the audio portion of the "Squid" commercial to include the word "unquote", and will change the last shot of the commercial to eliminate pictures of Regina products other than the Regina Powerteam. To counter plaintiff's argument that the disclaimer that "Consumer Reports is not affiliated with Regina and does not endorse products"

suggests that plaintiff has endorsed the Regina Powerteam, Regina is willing to modify the disclaimer in both advertisements to read "does not endorse Regina products". Regina demonstrated the revised commercials at the hearing on October 7, 1983.

I.

The Copyright Act of 1976, 17 U.S.C. §§ 101 et seq. (1977), authorizes this court to grant a preliminary injunction to "prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). In this Circuit, entitlement to a preliminary injunction requires the movant to show: "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious

questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curiam). See also, Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206-207 (2d Cir. 1979).

Once the elements of copyright infringement are made out, a preliminary injunction should issue even in the absence of a detailed showing of irreparable harm. Robert Stigwood Group Ltd. v. Sperber, 457 F.2d 50, 55 (2d Cir. 1972). In Consumers Union of United States, Inc. v. Theodore Hamm Brewing Co., Inc., 314 F. Supp. 697 (D. Conn.

1970), the court issued a preliminary injunction but not one as broad as requested by the plaintiff. Id. at 700. In Hamm, the court rejected the defendant's contention that there was no irreparable harm to Consumers Union. There defendant argued that an injunction was improper because the parties were not competitors and because Consumers Union had suffered no financial loss, and could be compensated fully by money damages in the event of judgment in its favor, id. The court stated:

> These contentions overlook [Consumers Union's] unique position in the business world. Throughout the years, it has been scrupulous in avoiding even the slightest affiliation with any commercial interest. Its most important asset is its good name for independence and accuracy; its reputation

> as an impartial and untainted adviser is the foundation upon which the public's confidence rests ... It is, of course, to be expected that now and then a manufacturer whose product is rated highly will seek to advertise the testimonial truthfully and fairly over as wide an audience of purchasers as possible. The extent to which such advertising is permissible is not here decided.
>
> For our purposes we need only decide whether the plaintiff has made a clear showing of probable success at trial with respect to its claims of copyright infringement, unfair competition and false and misleading advertising. If so, there is a likelihood that the plaintiff has and will in the future suffer harm. Because of the difficulties of proof, money damages may be inadequate; a preliminary injunction under such circumstances should issue to protect the plaintiff and the public interest.

Id.

In Amana Refrigeration, Inc. v. Consumers Union of United States, Inc., 431 F. Supp. 324 (N.D. Iowa 1977), the court granted summary judgment in favor of Consumers Union on its counterclaim alleging copyright infringement. The court stated:

> [Amana] claims the quoted portion of defendant's article is not copyrightable because it is merely a bald statement of fact without originality. The excerpt, however, is more than mere statment of fact. It contains defendant's original analysis and conclusion and is copyrightable and use by others for economic gain may properly be enjoined (footnote omitted).

431 F. Supp. at 326.

Consumers Union of United States, Inc. v. Hobart Mfg. Co., 189 F. Supp. 275 (S.D.N.Y. 1960), is distinguishable from

this case. In Hobart, a critical sales brochure was found uninfringing. Hobart involved bulletins directly criticizing the findings of "Consumer Reports". The advertisements here contain no such criticism and constitute an infringement of Consumers Union's copyright.

Consumers Union has established possible irreparable harm if an injunction is not issued since damages do not provide an adequate remedy in this case. It also has demonstrated likelihood of success on the merits of its copyright infringement claim.

Defendants have not challenged the validity of the plaintiff's copyright. Since Consumers Union has not given permission to the defendants to use any portion of the July article,

defendants' copying for commercial purposes constitutes an illegal infringement of Consumers Union's original, copyrighted material. See, Amana Refrigeration, Inc. v. Consumers Union of United States, Inc., 431 F. Supp. at 326. Courts have held that even where a small portion of a work is copied, a copyright violation may be found. Higgins v. Baker, 309 F. Supp. 635, 637 (S.D.N.Y. 1969).

The court is not persuaded that the fair use defense bars plaintiff's claim. This judge-made doctrine has been codified in 17 U.S.C. § 107. The fair use defense "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law

is designed to foster." Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc., 621 F.2d 57, 60 (2d Cir. 1980). It creates a "privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner ..." Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967) quoting Ball, The Law of Copyright and Literary Property 260 (1944). See also, Roy Export Co. of Vaduz v. Columbia Broadcasting System, Inc., 503 F. Supp. 1137, 1143 (S.D.N.Y 1980), aff'd, 672 F.2d 1095 (2d Cir. 1982). In Amana, the court rejected the

manufacturer-advertiser's claim of fair use finding that the use was for Amana's economic gain and contained "no comment or criticism of alleged inaccuracies" in the article in "Consumer Reports". 431 F. Supp. at 326-27. Here, the use by defendants does not constitute comment or criticism of plaintiff's article.

The first fair use factor set forth in § 107 is "the purpose and character of the use including whether such use is of a commercial nature or is for nonprofit educational purposes." Defendants' use is clearly of a commercial character in that it is contained in television advertisements. Nevertheless, the fact that a use is "of a commercial nature" does not necessarily negate a fair use determination. See,

Triangle Publications, Inc. v. Knight-Ridder Newpapers, Inc., 626 F.2d 1171 (5th Cir. 1980). The defendants, however, have taken copyrighted material for no purpose other than their own financial gain.

The second factor specified in § 107 is the nature of the copyrighted work. "Consumer Reports" is, as its name indicates, a consumer oriented magazine with an explicit no commercialization policy. The July 1983 article contains original conclusions of Consumers Union which are entitled to protection under the federal Copyright laws. With respect to the third factor, while the portion of the article used is relatively small in relation to the copyrighted work as a whole, it is not necessary for a

manufacturer to take much from "Consumer Reports" in order to reap commercial advantage from the use of the name and analysis of that publication. The fourth factor to analyze under § 107 is the effect of the use upon the market for, or the value of, the copyrighted work. The argument that fair use applies because Consumers Union is an objective provider of accurate information which is of public importance proves too much. Such an argument would destroy all of Consumers Union's rights in its literary property and name. Regina's commercial use of the article could be the demise of Consumers Union since such commercial use could lead the public to view Consumers Union as an unfair tester of products. The effect of denying an injunction in

this case would be to virtually nullify the copyright of Consumers Union.

As the Second Circuit has noted, "[t]he fair use doctrine is not a license for corporate theft empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance." Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc., 621 F.2d at 61.

The First Amendment defense urged by the defendants is unpersuasive and has been rejected by the court.

Defendants have copied material containing Consumers Union's original analyses and conclusions. The defendants have, without consent, used that material for advertising in two separate

television commercials. The court finds that the Consumer Reports commercial, the first Squid commercial and the revised Squid commercial all infringe plaintiff's copyright.

Since the court has found that issuance of an injunction is warranted under the Copyright Act, it need not reach plaintiff's other grounds for relief. Accordingly, plaintiff's motion for a preliminary injunction is granted. Plaintiff is directed to submit an order on notice forthwith.

SO ORDERED.

DATED: New York, New York
October 12, 1983

s/_____
U.S.D.J.

APPENDIX G

CONSUMER REPORTS July, 1983
Pages 369 through 371

Lightweight vacuum cleaners

Most of the 18 we tested were lightweight performers. Only one worked well.

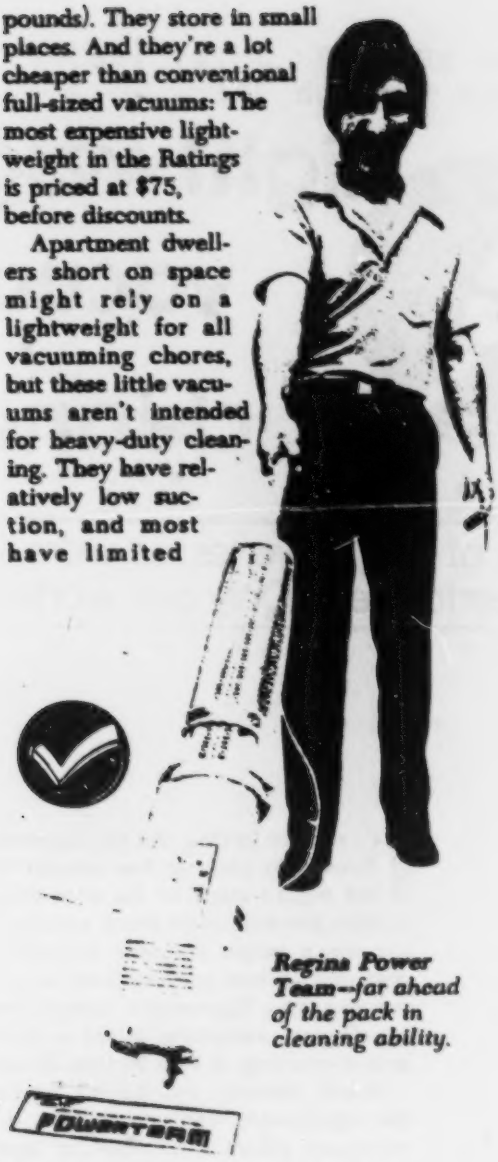
It's a chore to drag out the heavy-duty Hoover to pick up the crumbs from last night's snack or the sand tracked in from this morning's beach outing. You can use a carpet sweeper to touch up rugs, and a broom to clean bare floors. Or you can use a lightweight, upright vacuum cleaner—sometimes called an electric broom—on rugs as well as bare floors.

Bissell, Hoover, and Regina dominate the lightweight vacuum market. Each company offers a number of models under its own name as well as models sold through Sears, Wards, and Penneys.

These vacuums have several advantages. They're light (five to nine

pounds). They store in small places. And they're a lot cheaper than conventional full-sized vacuums: The most expensive lightweight in the Ratings is priced at $75, before discounts.

Apartment dwellers short on space might rely on a lightweight for all vacuuming chores, but these little vacuums aren't intended for heavy-duty cleaning. They have relatively low suction, and most have limited



Regina Power Team--far ahead of the pack in cleaning ability.

brush action. They therefore don't provide the deep carpet cleaning of a full-sized upright vacuum. A typical lightweight has a nozzle brush, but the brush just floats freely over carpets. Of the models we tested, only the *Regina Power Team* has a motorized nozzle brush, like that in a full-sized vacuum cleaner.

Some of the lightweights come with attachments to do above-the-floor cleaning. But, because of their low suction, they can't handle that job as well as a full-sized canister vacuum.

We kept the various limitations in mind when we tested the lightweights. Still, only one model, the check-rated *Regina Power Team*, was an adequate substitute for a full-sized vacuum.

Not-so-clean sweep

To test the lightweights' clean-up capabilities, we vacuumed sections of bare, finished wood panels that had been evenly sprinkled with white sand and light, dusty cellulose insulation. We also vacuumed sections of medium-pile acrylic carpet that had been evenly sprinkled with the insulation dust, which clings to carpet as lint and dust do.

Each machine was assigned its own section of bare wood and carpet to clean. To give the machines their best advantage in our tests, we always made sure they were cleaned out before we used them. After one, two, and three sweeps back and forth with the vacuum, we inspected each section of floor and carpet. We also weighed the amount of dust or dust and sand inside the machine after each vacuuming exercise.

Surface cleaning. On the bare wood, all the machines vacuumed up the cellulose dust, but most left sand behind. The *Bissell 3045-7*, the *Hoover S2039*, and the *Hoover S2015* did a respectable job of picking up both dust and sand in three sweeps. Those three were judged good. Only the *Regina Power Team* vacuumed the floor thoroughly.

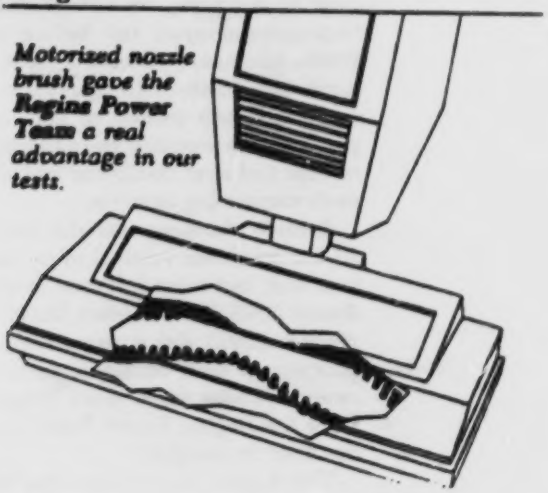
The *Regina Power Team* also stood out in our carpet-cleaning test. It alone left

the carpet presentable after only one sweep, pristine after two sweeps. The motorized brush in its nozzle obviously made the difference. The other lightweights generally left enough soil to make our blue carpet look rather linty.

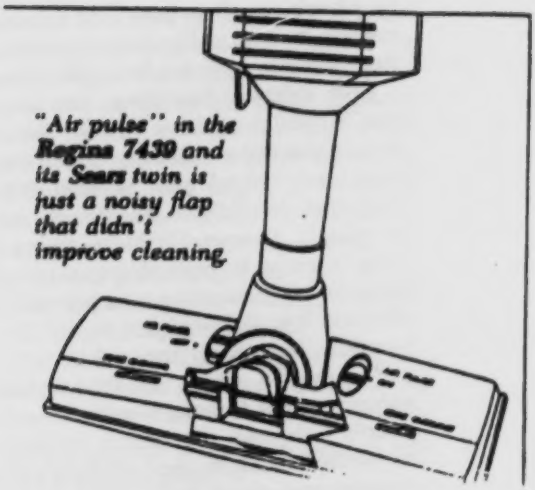
The *Regina HB7439* and the similar *Sears 62382* feature an air-pulse function in the nozzle (see the drawing on the next page). The manufacturer claims the pulsing air "disturbs carpet fibers" to loosen dirt and dust. But the pulsating air turned out to be much ado about nothing. The burbling of a flap inside the nozzle created the impression that the machine was swallowing up a lot of dirt. Inspection of the carpet proved otherwise.

Since the *Regina Power Team* was the only lightweight with a powered nozzle brush, it was the only model tested for deep carpet cleaning. Our experience showed that the others, using suction alone, couldn't handle the job. The *Power Team's* deep-cleaning performance was comparable to that of a fair, full-sized canister vacuum with a power nozzle.

Edge cleaning. Four vacuums, the *Regina HB7439* and *B6228* and their twins from Sears, have a shuttle in the nozzle that can shift suction to one edge of the nozzle or the other. In theory, that should improve the cleaning near walls or around furniture. In fact those models, along with most others, were judged poor in edge cleaning.



Motorized nozzle brush gave the Regina Power Team a real advantage in our tests.



"Air pulse" in the ***Regina 7439*** *and its* ***Sears*** *twin is just a noisy flap that didn't improve cleaning.*

On bare wood, most of the lightweights drew in the insulation dust adjacent to walls. But most, including those with the edge-cleaning feature, left the edge sandy. The *Hoover S2039*, which has a useful edge-cleaning feature, was the only model judged good.

On carpets, the lightweights typically left 1½ inches of border area virtually untouched. (When the models with the edge-cleaning feature were used on the full-suction setting, their edge-cleaning ability was even worse.) Eight lightweights were judged good in edge-cleaning on carpet, but even so, they passed over enough soil to leave the carpet linty.

How convenient?

There's more to convenience than light weight and small size. There's ease of maneuvering, frequency and ease of emptying the bag, and noise.

Maneuvering. Pushing any vacuum cleaner over a hard floor is easy. Pushing one over carpeting may not be. Since these lightweights are so slow to pick up

soil, it can take a lot of pushes and pulls to clean a section of carpet.

Most of the models we tested have little wheels or rollers built into the nozzle, making it reasonably easy to maneuver the machines over medium-pile carpet.

Five lightweights (three *Hoovers* and two *Wards*) don't have wheels. Since the nozzle bears down directly on the carpet, they were judged poor in maneuvering on carpet. In addition, the handle on the no-wheels *Hoover S2015* is short; you have to stoop to push that vacuum. For some users, vacuuming a carpet with one of these five lightweights would be exhausting; for others, impossible.

The *Eureka*, which is a modified hand vacuum rather than an electric broom, is poorly balanced. Its motor housing is under the handle, so most of the weight is concentrated there rather than near the nozzle, where the weight is needed. Its nozzle tended to float about aimlessly.

Several models, noted in the Ratings, have a second handle or grip down low, near the motor housing. That feature makes the machines easy to maneuver when vacuuming stairs.

Exhaust deflection. Air is drawn into a vacuum cleaner through its nozzle, filtered through the machine, and expelled back into the room. The air coming back into the room should be diffused so that it doesn't disturb loose dust, particularly that on hard floors.

All the *Hoovers* and their twins from *Wards* aimed much of their exhaust directly at the floor. With those models, trying to pick up dust on a bare floor was an absurd blow-and-chase operation.

The *Eureka* blew its exhaust out a blower port, right at the person doing the vacuuming.

Capacity. With most of the lightweights, we determined capacity by vacuuming up cellulose dust until the suction strength we measured decreased dramatically and the machines essentially became clogged. Then we weighed the dust in each machine.

On the *Regina* and *Sears* models, dust is drawn through a permanently attached cloth bag and deposited in a small cup. Suction doesn't decrease as the cup fills up, so we we based maximum capacity on the amount of dust the cup would hold. It was very little: a mere half ounce.

The *Eureka* held only 1⅛ ounces of dust; the *Hoover S2015*, three ounces. The others held four to six ounces. (By way of comparison, the smallest of the full-sized vacuums we've tested recently could hold 11 ounces of dust.)

The *Hoover S2039* and *S2041* and the *Wards 7260* have gimmicky indicators to tell you when they've reached capacity. Chances are, the drop-off in suction will be indication enough.

Emptying. The smaller the capacity, the more often the vacuum cleaner has to be emptied. The dust cup on the *Regina* and *Sears* models (see photo at far left) is supposed to be emptied after each use. Otherwise, it's all too easy to vacuum until the cup overflows, spilling dust back into the bag. If you're doing a lot of touch-up cleaning, it might be wise to

Dust cup for Reginas and Sears is easy to overfill and then messy to empty.

empty the machine halfway through the job. If dust builds up to a point where it overflows, emptying will be a very messy chore, best done outside. We judged the *Regina* and *Sears* models poor in emptying convenience.

All the other models use disposable bags to contain the dust. Several of the *Hoovers* and the *Wards 7260* have the handiest design (see photo). The bag fits into a frame that slides in and out of the vacuum. The frame has a valve at the bottom that prevents dust from spilling when the bag is removed.

The *Hoover S2015*, the *Wards 7220*, and the *Eureka* use bags with a cardboard lid. With a little care, those bags are easy to remove and empty without spilling.

The *Bissell* and *Penneys* vacuums use a bag that's open at the top. It fits into and folds over a wire frame. You have to carefully gather the open top of the bag as you're removing it. If the bag is full, some spills are likely.

Several Hoovers and one Wards have the neatest kind of disposable dust bags.

Switches, cords. Nine models have the on/off switch conveniently within reach of the handle. The switch on the *Eureka* is near the handle, but just out of reach of the thumb on the pushing hand. On all other models, the switch is located on the motor housing. With these, you have to use one hand to grip the vacuum's handle, the other to work the switch.

On the machines with an adjustable nozzle brush or controls for edge cleaning, those controls are on the nozzle. You have to bend over to adjust them.

All the lightweights we tested have a 15- to 20-foot cord, which has to be wound up by hand for storage.

Initial suction. At best, these lightweight vacuums have only about half the suction strength of full-sized machines. Those judged poor in initial suction are likely to be too feeble to work well with optional cleaning attachments.

Extra speeds. Several models feature two or three motor speeds. In all, the highest speed was "normal." The optional speeds were slower. We did our tests with all models operating at normal speed. Since the performance at normal speed was marginal, at best, we see no use for the slower speeds.

Noise. None of the lightweights provide a lullaby for a downstairs neighbor in an apartment building. The *Hoover S2039* and *S2041*, the *Wards 7260*, and the *Eureka* were judged the quietest.

The models with variable speed settings were a bit quieter at slower speeds than they were at normal speed.

Recommendations

The check-rated *Regina Power Team*, with its power nozzle, performed much like a full-sized vacuum cleaner. It was the only model judged very good at picking up sand and dust from bare floors. It was the only model that did a very good job of cleaning our medium-pile carpet. And it did the job with the least effort.

The *Power Team*, about $72 before

discounts, could serve as the primary cleaning machine for an apartment dweller. It could also be especially useful for older or disabled people. The *Power Team's* main drawback is its limited dirt-holding capacity, which dictates frequent emptying.

Most of the other lightweights did a good job of picking up dust on hard floors, but only three did a presentable job of vacuuming up sand. While those three might do an acceptable job on low-pile, closed-loop carpeting (such as some indoor-outdoor or industrial carpeting), they'd be hopeless on deep-pile, open-loop carpeting. The best of the other machines, the *Bissell 3045-7*, was judged only fair in cleaning our carpet. ■

Ratings

Lightweight vacuum cleaners

Listed in order of estimated overall quality. Essentially similar models are bracketed and listed alphabetically. Prices are suggested retail; * indicates that price is approximate; + indicates that shipping is extra. Except for mail-order models, discounts are generally available.

Excellent ● Very good ◓ Good ○ Fair ◒ Poor ●

Brand and model	Price	Weight	Surface cleaning: Bare floor	Surface cleaning: Medium-pile carpet	Edge cleaning: Bare floor	Edge cleaning: Medium-pile carpet	Maneuvering on carpet	Exhaust deflection	Emptying convenience	Switch convenience	Initial suction	Noise	Capacity	Comments
● REGINA ELECTRIKBROOM POWER TEAM HS4918	$72*	9 lb.	◓	◓	◒	●	◓	◓	●	◓	●	◒	⅛ oz.	A,J,K
BISSELL DYNA-CLEAN 3048-7	56*	6¼	○	◒	◒	○	◓	○	◒	◓	◒	◒	6	E
HOOVER QUIK-BROOM 32039	75	8	○	●	○	◓	◓	●	◓	◒	◒	○	4	E,J
J.C. PENNEY Cat. No. 0639	65+	7	◒	●	●	●	◓	○	◒	◓	◒	◒	6	E,G
BISSELL DYNA-CLEAN 3004-4	52*	6¼	◒	●	●	○	○	○	◒	◒	◒	◒	6	—
BISSELL MULTI-VAC DYNA-CLEAN 3030-9	52*	6	◒	●	●	○	○	○	◒	◒	◒	◒	4½	I,J,L

Brand and model	Price	Weight	Surface cleaning: Bare floor	Surface cleaning: Medium-pile carpet	Edge cleaning: Bare floor	Edge cleaning: Medium-pile carpet	Maneuvering on carpet	Exhaust deflection	Emptying convenience	Switch convenience	Initial suction	Noise	Capacity	Comments
REGINA ELECTRIKBROOM B4216	42*	5¼	◒	●	●	●	○	◔	●	◔	●	●	½	G,K
SEARS KWIK-SWEEP Cat. No. 62362	35+	5¼	◒	●	●	●	○	◔	●	◔	●	●	½	H
HOOVER QUIK-BROOM S2041	70	8	◒	●	●	○	●	●	◔	◒	◒	○	4	J
WARDS JIFFY VAC Cat. No. 7260	48+	8	◒	●	●	○	●	●	◔	◒	◒	○	4	E,J
HOOVER QUIK-BROOM S2015	50	6¼	○	◒	◒	○	●	●	○	◒	◒	●	3	B
REGINA ELECTRIKBROOM HB7439	52*	6	●	●	●	●	◔	◔	●	◔	◒	◒	½	F,J,K
SEARS KWIK-SWEEP Cat. No. 62382	55+	6	●	●	●	●	◔	◔	●	◔	◒	◒	½	F,H
REGINA ELECTRIKBROOM B6228	48*	5½	●	●	●	●	◔	◔	●	◔	◒	●	½	E,K
SEARS KWIK-SWEEP Cat. No. 62372	45+	5½	●	●	●	●	◔	◔	●	◔	◒	●	½	E,H
EUREKA 163 Type A	70	5¼	●	●	●	●	○	●	○	○	●	○	1½	C,D
HOOVER QUIK-BROOM S2057-900	70	6¼	●	●	●	○	●	●	◔	◒	◒	●	4	I,J
WARDS JIFFY VAC Cat. No. 7220	38+	6¼	●	●	●	○	●	●	○	◒	◒	●	4½	J

SPECIFICATIONS AND FEATURES

All have 15-20 ft. power cord, which must be manually wound up for storage.

Except as noted, all have: • Suction-only operation, making them unsuited for deep carpet cleaning. • Single motor speed. • Nozzle brush that locks in position for hard-floor cleaning, floats for carpet cleaning. • Optional attachments, including upholstery nozzle, brush, and crevice tool, available for approx. $15 to $25.

KEY TO COMMENTS

A - Only model tested with power nozzle (see story). Judged fair at deep carpet cleaning.
B - Relatively short handle; requires stooping to push.
C - Modified hand vacuum is poorly balanced. Weight is concentrated in motor housing near handle; nozzle tends to float off floor and wander.
D - Blows exhaust air on user.
E - Two motor speeds.
F - Three motor speeds.
G - Nozzle brush is adjustable.
H - Optional attachments not available from Sears, but Regina attachments can be used.
I - Attachments included.
J - Has auxiliary handle near motor housing; useful when vacuuming stairs.
K - Essentially similar versions of Regina models available, as follows: HB6910 as HB6010 and HB6710; B4316 as B6518 and B4516; HB7439 as HB7739 and HB7839, B6228 as HB4528 and B6628.
L - Also available as J.C. Penney Cat. No. 6189, $55 +.

APPENDIX H

Text of respondents' commercial entitled "CONSUMER REPORTS"

Regina believes that the Electrikbroom Powerteam is the one lightweight that cleans like a heavyweight..

And CONSUMER REPORTS states "Regina Powerteam --far ahead of the pack in cleaning ability." [While these words are spoken, on the screen appear the name "CONSUMER REPORTS", the text of quotation and the subtitle, "CONSUMER REPORTS is not affiliated with Regina and does not endorse Regina products or any other products."]

Of all the lightweights tested "only one worked well." ["CONSUMER REPORTS," text of quotation and subtitle appear on screen.]

On medium pile carpeting Powerteam "did the job with the least effort". ["CONSUMER REPORTS," text of quotation and subtitle appear on screen.]

In fact, it's the only one CONSUMER REPORTS calls an "adequate substitute for a full-sized vacuum". ["CONSUMER REPORTS," text of quotation and subtitle appear on screen.]

The Electrikbroom Powerteam from Regina. CONSUMER REPORTS checkrates it -- you will too.

Text of respondents' commercial entitled "Squid"

You can fight your way through housecleaning with an ordinary vacuum cleaner -- or you can try the Regina Powerteam.

You can push furniture around -- or you can glide in between.

Ordinary vacs don't like to go upstairs -- Regina Powerteam thinks nothing of it.

And it cleans deep. It's the only lightweight that CONSUMER REPORTS says, Quote, "was an adequate substitute for a full-sized vacuum." Unquote. [As these words are spoken the following subtitle appears on screen, "CONSUMER REPORTS is not affiliated with Regina and does not endorse Regina products or any other products."]

Why wrestle with an ordinary vacuum when there's Powerteam. One fine Electrikbroom cleaner from Regina.

Office-Supreme Court, U.S.
FILED
JUL 16 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CONSUMERS UNION OF UNITED STATES, INC.,
Petitioner,

v.

THE NEW REGINA CORPORATION and
GREY ADVERTISING INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether, in exercising its discretion to decide that a preliminary injunction was inappropriate, the United States Court of Appeals for the Second Circuit correctly applied copyright law principles to the facts of this case to determine that petitioner was unlikely to succeed on the merits?

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R. Stern & E. Gressman, SUPREME COURT PRACTICE § 4.19 (5th ed. 1978) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1870

CONSUMERS UNION OF UNITED STATES, INC.,
Petitioner,

v.

THE NEW REGINA CORPORATION and
GREY ADVERTISING INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents The New Regina Corporation ("Regina")[1] and Grey Advertising Inc. respectfully request that this Court deny the petition for certiorari filed May 14, 1984

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[1] This litigation involves television advertisements regarding Regina vacuum cleaner products. When the case was initiated, they were manufactured by The Regina Company, then a division of a wholly-owned subsidiary of General Signal Corporation, a defendant below. On July 3, 1984, General Signal divested Regina, and The New Regina Corporation was formed. After consultation with the Clerk's Office, we have captioned this Brief in the name of the new entity, now the real party in interest.

Pursuant to Rule 28.1 of the Rules of the Supreme Court, respondents The New Regina Corporation and Grey Advertising Inc. state that each has no corporate parent and no publicly-owned subsidiaries or affiliates.

seeking plenary review of an interlocutory decision by the United States Court of Appeals for the Second Circuit that reversed and vacated a preliminary injunction barring broadcast by respondents of two television commercials.[2]

In September, 1983, Regina began a national television advertising campaign for The Regina Electrikbroom Powerteam vacuum cleaner ("The Regina Powerteam") that contained brief, verbatim quotations from an article that evaluated lightweight vacuum cleaners in *Consumer Reports*, published by petitioner Consumers Union of United States ("CU"). On September 30, 1983, CU filed the instant action. The Complaint alleged violations of the copyright laws, 17 U.S.C. § 1 *et seq.*, of the Lanham Act, 15 U.S.C. § 1114(1) and 1125(a); and of state and common law. On October 13, 1983, upon the basis of a record consisting exclusively of written briefs and affidavits, the district court entered a preliminary injunction based solely on the copyright claim.

Regina took an expedited appeal to the Second Circuit. On November 25, 1983, a unanimous panel of the Court of Appeals reversed the District Court and vacated the injunction. The Court issued its opinion in support of its judgment on December 6, 1983. The court found that no preliminary injunction was appropriate because CU failed to establish a likelihood of success on the merits on any ground asserted in its complaint or to introduce concrete evidence of harm to CU, while there was "substantial evidence of potential harm to Regina from maintenance of the injunction." (Pet. App. 24a).

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[2] The following abbreviations will be used in this brief: "Pet." for citation to the Petition for a Writ of Certiorari, "Pet. App." for citation to the Appendix to the Petition and "App." for citation to the Joint Appendix below.

STATEMENT OF FACTS

Regina's principal business is the manufacture of lightweight, upright vacuum cleaners. These are lighter, smaller, and cheaper than conventional full-sized vacuum cleaners. Regina's top of the line model is The Regina Powerteam.[3]

Petitioner CU is a non-profit, independent consumer organization that compiles and provides information to the public regarding consumer products and services. CU maintains testing laboratories and facilities, conducts tests, and makes judgments on purchased samples of tested products and services. The results of CU's tests are published in its monthly magazine, *Consumer Reports*, distributed to paid subscribers and sold on newsstands.[4]

In its July 1983 issue, *Consumer Reports* evaluated lightweight vacuum cleaners. The headline of the article declared "Most of the 18 we tested were lightweight performers. Only one worked well." The one product that *Consumer Reports* singled out was The Regina Powerteam. The article was illustrated with a picture of a man holding The Regina Powerteam, captioned "Regina Powerteam—far ahead of the pack in cleaning ability." The *Consumer Reports* article was remarkable in the clearcut, decisive edge it gave The Regina Powerteam over the other seventeen models tested:

> —"Of the models we tested, only the *Regina Power Team* has a motorized nozzle brush, like that in a full-sized vacuum cleaner."
>
> —"[O]nly one model, the check-rated *Regina Power Team*, was an adequate substitute for a full-sized vacuum."
>
> —"Only the *Regina Power Team* vacuumed the floor thoroughly."

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[3] App. 129-130.

[4] App. 84-85.

—"The *Regina Power Team* also stood out in our carpet-cleaning test. It alone left the carpet presentable after only one sweep, pristine after two sweeps."

—"Since the *Regina Power Team* was the only lightweight with a powered nozzle brush, it was the only model tested for deep carpet cleaning. Our experience showed that the others, using suction alone, couldn't handle the job. The *Power Team's* deep-cleaning performance was comparable to that of a fair, full-sized canister vacuum with a power nozzle."

—The article concluded: "The check-rate *Regina Power Team*, with its power nozzle, performed much like a full-sized vacuum cleaner. It was the only model judged very good at picking up sand and dust from bare floors. It was the only model that did a very good job of cleaning our medium-pile carpet. And it did the job with the least effort."[5]

CU also disseminated the results of its evaluation of lightweight vacuum cleaners well beyond the pages of its magazine. *Consumer Reports* distributes news reports encapsulating its test reports to newspapers nationwide. In late July, 1983, *Consumer Reports* issued such an article on the lightweight vacuum cleaners, distributed to between 300 and 400 papers. The newspaper account parallels in briefer form the magazine article.[6]

Because of the highly competitive nature of the market for lightweight vacuum cleaners, most manufacturers,

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[5] Pet. App. at 63a-74a. The article contained a chart summarizing the evaluations of the products tested. The Regina Powerteam was listed at the top of the chart, accompanied by a check mark. Models are check-rated when Consumers Union judges the samples of the products tested to be of high overall quality and appreciably superior to non-check-rated models in the same report.

[6] App. 145-150. Additionally, CU aired an even briefer radio "Report to Consumers" on July 26, 1983 trumpeting The Regina Powerteam. App. 151-152.

including Regina, advertise their product directly to the consumer. Sales of lightweight vacuum cleaners are cyclical, with more sold in the second half of the year (particularly during the Christmas season) than the first six months. Consumer marketing is therefore geared to this second six-month period, especially the fourth calendar quarter.[7]

As a part of its product promotion, Regina planned a national television advertising campaign for 1983. Regina's research has indicated that there is a strong correlation between advertising its products and increases in the sales of its products. Regina coordinated its national advertising with its promotional activities among retail sales outlets in an attempt to maximize shelf space, exposure and selling conditions for its products. The advertising campaign was designed to lead up to the Christmas selling season.[8]

In connection with its national advertising campaign, Regina purchased time spots on the American Broadcasting Company, the National Broadcasting Company, and CBS, Inc. networks, starting September 26, 1983. Programs and time slots were selected on the basis of demographic research to aim the messages most efficiently and most economically at the target audience of potential lightweight vacuum cleaner purchasers. Because of practices in the television industry, Regina purchased its time spots several months in advance.[9]

Regina prepared three commercial messages for this television campaign. The first, not at issue in this litigation, emphasized the lightweight nature of The Regina Powerteam by showing several women handling the product as if it were a military rifle.

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[7] App. 133-34.

[8] App. 134.

[9] *Id.*

The second message, entitled "Squid", also emphasizes the lightweight convenience of The Regina Powerteam, compared to full-sized vacuum cleaners. It then reinforces the message by reassuring the potential customer that the product can be used like a full-sized vacuum cleaner. During one of the many different visual portions of the message the voice-over announcer quotes, accurately, that The Regina Powerteam "is the only lightweight that *Consumer Reports* says was an adequate substitute for a full-sized vacuum." Superimposed on the screen the entire time *Consumer Reports* is mentioned, is the statement that "*Consumer Reports* is not affiliated with Regina and does not endorse Regina products or any other products." [10]

In the third message, entitled "Consumer Reports," Regina provides the consumer with more complete information regarding the *Consumer Reports*' glowing evaluation of its product. The message includes several quotations from the *Consumer Reports*' evaluation visually displayed on the screen as they are read by the announcer. Each time that *Consumer Reports* is mentioned and a quotation is read, there appears on the screen the statement that "*Consumer Reports* is not affiliated with Regina and does not endorse Regina products or any other products." This statement appears on screen for a total of 14 seconds out of the 29.5 second actual duration of the message.[11]

In preparing its message, Regina took great pains to insure that its messages were accurate, fully comported with applicable law, and did not suggest that CU endorsed or sponsored the product or the messages or otherwise associated it with Regina rather than with the information in its magazine. As a consequence, Regina took the extraordinary step of including in its messages

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[10] Pet. App. 6a-7a; 77a-79a.

[11] Pet. App. 7a; 77a-79a.

the visual statement that emphasizes the independence of *Consumer Reports* from Regina and the fact that *Consumer Reports* does not endorse products.[12]

Regina notified CU that it planned to broadcast these commercials. CU ultimately filed suit and sought a preliminary injunction, representing a prior restraint against the airing of the commercial messages. At the approximately one-half hour hearing on its injunction request in the district court, CU presented no live testimony, but offered only the argument of its counsel and a conclusionary affidavit by its Executive Director. While CU contended that it would be irreparably harmed by these messages, its only evidentiary assertion was a single written paragraph:

> "Each broadcast [of the Regina message] hurts Consumers Union deeply. Each broadcast destroys more and more of the untainted reputation for impartiality and freedom from the commercial bias which we have painstakingly spent forty-seven years in acquiring.[13]

In opposition to CU's request for an injunction, Regina submitted the affidavit of its President that set forth the circumstances leading to the development of the Regina advertising campaign. The affidavit also documented the irreparable harm Regina would suffer by an injunction preventing it from communicating with the public:

> The entry of an injunction would irreparably disrupt Regina's business plans and operation. It is uncontroverted that Regina is in a highly competitive market, with low brand identification, a modest

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[12] Moreover, Regina presented the message on the screen in a size that is comparable with normal television advertising practice for required disclosures, used by major companies such as General Motors or Ford. In addition, the statements remain on the screen for a considerably longer period than is normally utilized for such disclosures. App. 136.

[13] Pet. App. 23a; App. 98.

market share, and the challenge of new entry. Regina has made a substantial commitment of resources to purchase national advertising time on the three networks and has coordinated its entire marketing programs with this national advertising.

An injunction would play havoc with Regina's marketing strategy. Retail dealers and the trade have been informed of the marketing support represented by Regina's national advertising campaign. Inventories and shelf space commitments exist reflecting Regina's marketing commitments. It is impossible to quantify the loss in dollars for the hoped for success of the campaign cannot be predicted. Enjoining Regina from presenting its messages at the times it selected would be especially harmful since it would deprive Regina of its audience just at the time of the year when sales of vacuum cleaners peak. Regina will be irreparably injured not only by the loss of sales and audiences, but by the harm that will be caused to existing relationships with the trade and its dealers.[14]

Since the Second Circuit vacated the district court's injunction, Regina has broadcast the "Squid" and "Consumer Reports" messages on the three national television networks between December, 1983 and May, 1984.

SUMMARY OF ARGUMENT

CU asks this Court to undertake its own plenary review of the Second Circuit's judgment of CU's likelihood of success on the merits of its copyright claim and thereby have this Court conduct its own "full review" of whether a preliminary injunction is appropriate. This Court's review of that component of the decision below is unwarranted, not only because the decision is interlocutory, but because that decision rests on the Second Circuit's discretionary factual determination that

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[14] App. 139-140.

the balance of equities favored Regina, not CU. Thus, the review requested by CU would not change the result below.

Nor does anything in the Second Circuit's discussion of the copyright fair use doctrine warrant review. The Second Circuit's decision is in conflict with no decision of this Court or any court of appeals, but like previous decisions of that and other circuits, balanced both the factors enumerated by Congress as relevant to fair use and the evidence of harm on the record, and made a determination on the facts of this case. CU's efforts to manufacture a conflict between the Second Circuit decision and this Court's subsequent opinion in *Sony Corporation of America v. Universal City Studio, Inc.*, 104 S.Ct. 774 (1984) does not withstand scrutiny of the court of appeals' opinion.

ARGUMENT

I. SINCE THE DECISION OF THE COURT OF APPEALS INVOLVED A PRELIMINARY INJUNCTION, IT IS NONFINAL AND NOT RIPE FOR REVIEW BY THIS COURT AND ALSO RESTS INDEPENDENTLY ON FACTUAL DETERMINATIONS NOT BEFORE THIS COURT

This Court traditionally has refused to review interlocutory judgments of federal courts.[15] The prohibition, although not jurisdictional, conserves limited judicial resources and avoids piecemeal litigation. Interlocutory

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[15] *See, e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-85 (1952); *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (lack of finality "of itself alone furnished sufficient ground for the denial"); R. Stern & E. Gressman, SUPREME COURT PRACTICE § 4.19 (5th ed. 1978).

review has been held proper only in limited circumstances involving exceptional facts.[16]

CU has made no showing that this is such a case.[17] To the contrary, even if CU could demonstrate that its view on fair use were correct, that would not change the result below. The court of appeals explicitly found that "CU has not sustained its burden of showing that the equities lie in its favor." (Pet. 23a.) While acknowledging CU's reputation, the Court held that "Regina's use of an explicit disclaimer makes CU's conclusory claims of harm unacceptable." (Pet. 24a.) On the other side of the balance, the court found "substantial evidence of potential harm to Regina from maintenance" of an injunction. (*Id.*) CU has not challenged these findings. Hence, the decision below is correct for reasons independent of the likelihood of success on the merits challenged in the petition.

II. THE DECISION BELOW IS COMPLETELY CONSISTENT WITH DECISIONS OF THIS COURT AND THE COURT OF APPEALS

A. CU's first argument for review, that the Court of Appeals misapplied the commercial free speech doctrine (Pet. 18-32), is a strawman. Nothing in the opinion

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[16] *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *American Construction Co. v. Jacksonville T. & K. W. Ry.*, 148 U.S. 372, 384 (1893).

[17] The writ of certiorari to the United States Court of Appeals for the Second Circuit in *Harper & Row Publishers, Inc. v. Nation Enterprises*, No. 83-1632, raises issues of fair use very different from those in this case. In any event there is no reason to hold this petition pending a decision in *Harper & Row*, since this case will be returned to the district court in any circumstance for trial on the merits, and the courts below will have the benefit of any relevant holdings in *Harper & Row* in subsequent proceedings.

below supports CU's apocalyptic suggestion that the Second Circuit carved out a new commercial speech fair use exception that rides roughshod over all copyright rights, or that its holding is "inconsistent with this Court's numerous decisions in the commercial speech area." (Pet. 20).

The court simply made the required factual analysis of the four factors delineated in the statutory definition of fair use, 17 U.S.C. § 107. In considering the "purpose and character of the use," 17 U.S.C. § 107(1), the Second Circuit rejected CU's argument that a commercial use can never be a fair use. CU would now have this Court construe that rejection as a holding that puts a commercial use on a higher footing than other uses. The court of appeals' ruling, however, was simply that commercial use "alone does not defeat a fair use defense," (Pet. App. 11a), and that—in this instance—the use does "more than propose a commercial transaction," [18] it "includes the conveyance to consumers of useful information which is protected by the First Amendment." (Pet. App. 11a). Moreover, the court contrasted such conveyance of information with appropriation of the form of expression. (Pet. App. 12a). The court's conclusion in this regard is firmly grounded upon this Court's recognition of the public interest in commercial speech:

> [A]dvertising . . . is dissemination of information as to who is producing and selling what product, for what reason and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those

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[18] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976), *quoting Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385 (1973).

> decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of information is indispensable.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

The Second Circuit's holding that commercial advertising can be a fair use accords with the only other circuit decision involving advertising, *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980).[19] It also accords with the many other decisions holding that a use is not disqualified as a fair use merely because it has a commercial motive.[20]

Hence, the Second Circuit's decision represents no startling departure from the commercial speech doctrine or court of appeals precedent on fair use in a commer-

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[19] In *Triangle*, the court of appeals held that the fair use doctrine permitted a newspaper's comparative advertisements promoting its television program guide publication to display copyrighted covers of a competing publication, *TV Guide*. The *Triangle* court took account of Congress' emphasis that "the doctrine of fair use must be flexible." 626 F.2d at 1176 n.13, *citing*, H.R. No. 94-1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* [1976] U.S. Code Cong. & Admin. News, p. 5659, Sen. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975). It found that the fact that "the commercial use occurred in the course of a truthful comparative advertisement undercuts the significance of the commercial nature of the use." *Id.* Regina's messages too are in the nature of comparative advertising, merely substituting for the advertiser's own unavoidably self-serving claims more reliable references to a third party's findings.

[20] *See Elsemere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980) (per curiam); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1969); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964); *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F.Supp. 217 (D.N.J. 1977); *Karll v. Curtis Publishing Co.*, 39 F.Supp. 836 (E.D. Wisc. 1941).

cial context.[21] It is merely the effectuation of Congress' direction to consider "the purpose and character of the use." It is likewise consistent with the purposes for which Congress recognized fair use. Indeed, in that context, CU's reliance on Professor Nimmer to attack the Second Circuit's decision is puzzling (Pet. 26), since Professor Nimmer submitted an affidavit in the district court in support of Regina, which indicated, *inter alia*, advertising of an informational nature may be a fair use notwithstanding its commercial nature and that

> "The Regina messages precisely constitute such an informational use in that they provide information to the public as to the objective evaluation of a product by a third party, and hence provide poten-

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[21] The court's holding is not "directly contrary" (Pet. 26) to the Second Circuit's previous decision in *Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc.*, 621 F.2d 57 (2d Cir. 1980). There is no resemblance between the two cases. At issue in *Iowa State* was a 28-minute student film regarding an Olympic wrestling champion at the school. Plaintiff sought to sell the film to ABC for use during its Olympics broadcast coverage; no agreement was ever consummated, but ABC ultimately used substantial parts of the film. The Second Circuit found that the fair use doctrine was inapplicable, principally because ABC's use "did foreclose a significant potential market to Iowa—sales of its film for use on television in connection with the Olympics." *Id.* at 62.

In rejecting ABC's argument that its use was worthy of protection under the first fair use standard because it assisted the development of historical and biographical works, the court of appeals made the dictum quoted by CU (Pet. 27) out-of-context that the "fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance." *Id.* at 61. In the context of the *Iowa State* facts, the statement makes perfect sense. As it is being applied here, CU equates the absence of CU's consent, *ipso facto*, with corporate theft by Regina. But that equation totally miscomprehends the fair use doctrine which *by definition* is use of copyrighted material *without the consent of the copyright owner*. *E.g.*, *Rosemont Enterprises*, *supra*, 366 F.2d at 306.

> tial buying information. Moreover, § 107 expressly provides that "criticism" and "comment" are primary forms of use envisaged under the fair use doctrine. The repetition of such criticism or comment, within reasonable limits, in my opinion likewise constitutes a use envisaged by the fair use doctrine. For example, it would be unthinkable for the publisher of a book or the producer of a Broadway play to have to obtain a license from the *New York Times* before there could be a quotation of comments from a favorable review appearing in the *Times*." [22]

B. CU's attempt (Pet. 32-46) to concoct a conflict between the decision below and this Court's recent decision in *Sony Corp. v. Universal City Studios*, 104 S.Ct. 774 (1984) is equally extravagant. CU's selective excerpting from the *Sony* opinion regarding commercial use (Pet. 33) and harm to the copyright owner (Pet. 35-36) ignores that in this case, unlike, for example, in *Sony*, the copy does not compete with and cannot substitute for the copyrighted works. Regina is not selling or promoting its advertisements. Thus, the court of appeals found that "we [are] faced with a claim of injury which does not stem from competition between the copyright owner and the copier. . . ." (Pet. App. 16a).[23]

In *Sony*, on the other hand, in language seized upon by CU, this Court contrasted "commercial use" with the "*monopoly privilege* that belongs to the owner of a copyright." 104 S.Ct. at 793 (emphasis added). Thus, it is evident it looks on commercial use as unfair because it competes against the copyright holder. The Second Cir-

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[22] App. 161.

[23] As Professor Nimmer recognized (App. 163), CU's arguments suggest that the prevailing custom of excerpting theatre, movie, and restaurant reviews from major publications replaces the demand for the copyrighted original and is an infringement, an erroneous result that runs counter to the basic purpose of copyright.

cuit was entirely consistent with *Sony*, therefore, when it looked on the fourth fair use factor, "the effect of the use upon the potential market for or value of the copyright work," [24] as "aimed at the copier who attempts to usurp the demand for the original work." [25]

Despite the fact that there have been previous instances where advertising uses of *Consumer Reports'* evaluations had not been enjoined,[26] CU placed in the record no concrete evidence of actual or future harm to the demand for its works, let alone evidence amounting to a preponderance of the evidence. In such consequences, the Second Circuit's rejection of a conclusory assertion of harm in an affidavit (App. 98) is unremarkable and requires no review by this Court.[27]

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[24] 17 U.S.C. § 107(4).

[25] Pet. App. at 14a-15a (citations omitted).

[26] *Consumers Union of United States v. Theodore Hamm Brewing Co., Inc.*, 314 F.Supp. 697 (D. Conn. 1970); *Consumers Union of United States, Inc. v. Hobart Manufacturing Co.*, 189 F.Supp. 275 (S.D.N.Y. 1960).

[27] CU's attempts to ascribe an evidentiary standard to the Second Circuit's evaluation of the absence of evidence of harm reads too much into what is in the context of the evidence an inconsequential choice of words.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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THE NEW REGINA CORPORATION and
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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Respondents.

ON PETITION FOR A WRIT OF
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COURT OF APPEALS FOR THE
SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

Petitioner Consumers Union of

United States, Inc.* respectfully submits this reply brief in support of its petition for a writ of certiorari.

I. This case should be decided in tandem with Harper & Row v. Nation.

The Court's grant of the petition for a writ of certiorari in Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d 195 (2d Cir. 1983), cert. granted, 52 U.S.L.W. 3860 (U.S. May 29, 1984 No. 83-1632), strongly suggests that the instant petition likewise be granted

* Pursuant to Rule 28.1 of the Rules of the Supreme Court, petitioner states that it has no corporate parent and no publicly-owned subsidiaries or affiliates.

and the two cases decided with reference to each other.*

Both Harper & Row and this case raise important, unprecedented issues dealing with the "interplay" of the First Amendment and the fair use doctrine under the copyright statute. The underlying question in both cases is the same: to what extent does the First Amendment require a diminution of copyright protection?

Certiorari should be granted here because this case differs from Harper & Row in several important respects,

* The Court of Appeals below relied on its earlier opinion in Harper & Row to support the decision below. (13a)

including both the nature of the subject matter of the copyrighted work and the purpose and character of the defendants' use. Indeed, whatever the ultimate outcome in Harper & Row, reversal is mandated here because of the Second Circuit's unwarranted application of the commercial speech doctrine to nullify petitioner's copyright.

In Harper & Row, the Court of Appeals held that First Amendment principles of free expression overrode the copyright holder's rights and authorized the copying of a portion of a former President's memoirs by a journalist for use in a political news magazine. The court's decision was grounded on the fact that the material

copied there was plainly at the core of speech deserving full First Amendment protection: "political events of major significance involving a former President of the United States"* 723 F.2d at 204.

The instant case involves neither political speech nor news reporting. Here, another panel of the Second Circuit invoked the "First Amendment commercial speech doctrine" to permit a vacuum

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* The Second Circuit characterized the subject of the copied material as follows: "knowledge so necessary to a democratic state" (723 F.2d at 197); "the very essence of news and of history" (Id. at 204); "concerning important matters of state" (Id. at 208); "vital facts and historical observations about our nation's life"; and "the reporting of information concerning political decisions at the highest level of government" (Id. at 208).

cleaner manufacturer to copy word for word several copyrighted evaluations from CONSUMER REPORTS praising the Regina Powerteam lightweight vacuum cleaner and to use them in paid television advertisements designed solely to persuade viewers to buy the Regina product.

Thus, whether or not this Court rules that Harper & Row was correctly decided, it is respectfully submitted that certiorari should be granted in this case and the decision below reversed. Should this Court rule that the First Amendment values inherent in the political news information copied in Harper & Row are insufficient to negate the copyright holder's rights, it would

seem to follow as an a fortiori proposition that this case too was wrongly decided by the Second Circuit.

Even if this Court were to rule that Harper & Row was properly decided, certiorari should still be granted here and the Court of Appeals reversed because the opinion below improperly elevates constitutional protection for product advertisements. Such an apotheosis of commercial speech at the expense of the rights secured by the copyright statute is inconsistent with this Court's prior decisions and the public interest. See Petition for Writ of Certiorari, pp. 18-32.

II. This matter is ripe for review by the Court.

Respondents erroneously assert that the Court should ignore the merits of the petition and deny it because the issues arise in the context of a preliminary injunction. What respondents fail to note is that the judgment of the Court of Appeals is for all intents and purposes the final judgment in this case.

As is common in copyright litigation, plaintiff's motion for a preliminary injunction was the procedural linchpin upon which the case has been fully determined.

The record is complete. There are no unresolved factual or legal disputes on the copyright issues raised in the petition. These questions were squarely faced and definitively ruled upon by the court below. Indeed, the Court of Appeals' legal analysis of the copyright issues precludes any further fact finding which would affect its holding.

On the significant copyright and First Amendment issues raised by this petition,* the ruling of the Court of

* Respondents' suggestion that the injunction would have been denied even if copyright infringement had been found is in error. Had the Court of Appeals found infringement, under governing law in the Second Circuit, the injunction on copyright grounds would have been sustained as a matter of course even in

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Appeals is absolute and final.

The ruling below is "fundamental to the further conduct of the case." United States v. General Motors Corp., 323 U.S. 373, 377 (1945); Indeed, there may well be no further proceedings below unless the Court of Appeals is reversed. This Court may and should review such a judgment. cf. Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964) ("finality" under 28 U.S.C. § 1291 is to be given a "practical rather than a

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the absence of a detailed showing of irreparable harm. (51a) The Court of Appeals, in fact, did not consider the irreparable injury question in connection with petitioner's copyright claim but only with the Lanham Act and state law claims which the Court below reached only after finding no copyright infringement.

technical construction"); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

Conclusion

Petitioner respectfully requests that the petition for a writ of certiorari to the Court of Appeals be granted.

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August 31, 1984

Respectfully submitted,

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